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on

STATUTE LAW

FIFTH EDITION

BY

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*Of the Middle Temple, Barrister-at-Law;
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Judicature at Madras*



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PREFACE TO THE FIFTH EDITION

THE preparation of another edition of this work after an interval of 15 years has involved a considerable amount of reading and research owing to the wide and varied range of the subjects discussed in it. Hence the additions to the text and to the table of cases. The latter has been increased by about 350 additional cases, not all of them recent.

There have been several important developments in the law relating to the construction of statutes since 1936. Probably the most important is the extension of delegated legislation in all branches of our economy. Not only have the modern cases of frequent occurrence to be noticed on this topic but the Statutory Instruments Act, 1946, and the statutory instruments issued thereunder have effected many alterations and improvements in the old law under the Rules Publication Act of 1893. Consequently the chapter on this subject has been almost entirely rewritten. Among many other things further treatment has been given to that tiresome phrase "as if enacted in this Act." Here I owe a special debt of gratitude to my old friend Sir Cecil Carr, K.C., Counsel to the Speaker, an acknowledged authority on delegated legislation, who by his books and his personal communications with me has rendered me the greatest possible help in redrafting this chapter.

A subject which has been largely rewritten and has caused me some anxiety is Chapter VIII, on the territorial effect of British statutes and particularly the law governing the transfer of moveables and choses in action. I trust I have represented correctly the views of the learned authors on whom I have relied for light on this difficult and controversial topic.

Other portions of the book which have involved special revision are those affecting the Crown, whose position in litigation *vis-à-vis* the subject has been changed by the Crown Proceedings Act, 1947, the chapter on Enabling Acts, and that on Statutes creating Duties.

The work has I hope been thoroughly revised. The arrangement of the book has been preserved, but the marginal notes have been incorporated in the text as sub-divisions of the chapters.

This, I hope, has resulted in increasing the usefulness of the analysis at the head of each chapter. A problem was presented by the citation of American and Dominion cases in the last edition. None of them was less than 40 or 45 years old and had evidently not been brought up to date for many years. It was decided that to bring the American decisions up to date now would involve a laborious task disproportionate to the utility of the result. These have therefore been excised. I have attempted to bring the Canadian, Australian, and New Zealand decisions approximately up to date. Some Indian cases have also been included.

My thanks are due to my friend Mr. John Burke for his constant and ready advice and for relieving me of much of the detail in the preparation of this book for the press.

I should like also to thank the staff of the Middle Temple library for their help in finding for me numerous references and cases.

C. E. O.

MIDDLE TEMPLE,

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Objects of work.

1. The object of this treatise is to set forth in a methodical way the rules now in force (*a*) for the interpretation of British and Colonial statutes, and to explain their effect and operation. It does not profess to be a digest of all the judicial decisions in which *dicta* are to be found on the subject cited, but contains a selection from the leading cases on the points discussed, or from cases which contain judicial *dicta* of the greatest weight and pertinence.

Text-books on the subject.

2. (1) *English*. Although it is a matter of everyday importance that the rules which regulate the interpretation of statutes should be as widely known as possible, it is not always easy to ascertain what those rules are. Comyns, Viner, and Matthew Bacon, in their well-known digests and abridgments of the laws of England, collected together (Com. Dig. tit. Parliament, R., and Bacon's Abr. tit. Statute) the principal rules on the subject which are to be found in Coke's Institutes, and in the older reports, more especially Plowden. But neither these collections of rules nor the treatise most generally recognised as the best authority on the subject, Dwarris on Statutes (*b*), can be said to have dealt completely with the subject.

(*a*) Rules for the construction of statutes formerly adopted, but now rejected or forgotten, are not fully dealt with. Such rules are alluded to up and down the reports; for instance, in *Miller v. Salomons* (1852), 7 Ex. 475, at p. 559, Pollock, C.B., says as to a comment by Lord Coke upon 13 Edw. 1, st. 4 (*De Circumspecte agatis*), "I do not believe such a construction of a statute would be tolerated in modern times." See also *Entick v. Carrington* (1765), 19 St. Tr. 1029; Wilberforce 217.

(*b*) 2nd edit. published in 1848.

Since the first edition of this work was begun, two English law-books of high merit on the interpretation of statutes have been published by Sir P. B. Maxwell (c), and Master Wilberforce (d), and also the valuable Judicial Dictionary of Mr. Stroud (e), which is not primarily concerned with statutes, but is a valuable epitome of judicial interpretations of statutory terms. The rules for construction recognised in early times have also been dealt with in Professor Theodore F. T. Plucknett's learned treatise on "Statutes and Their Interpretation in the First Half of the Fourteenth Century" (f), a work of considerable interest to students.

(2) *American*. The interpretation of statutes has been ably treated in America by the late Mr. Theodore Sedgwick (g). The object of his treatise is "to explain the technical terminology that belongs to them (constitutional and statute law), to give their classification, describe their incidence, and finally to define the mode of their application; to declare the rules of interpretation by which they are, in cases of doubt, to be expounded, and to illustrate these rules by the light of adjudged cases" (h). His treatise has been of the greatest assistance in the preparation of the present work, and is often quoted, for "the rules governing the application of statutes may, as a general proposition, be considered the same in both countries" (i). But the head of constitutional law is peculiar to American jurisprudence and to the jurisprudence of those parts of the King's dominions which, like Canada and Australia, have federal constitutions (k); for the Legislature of the United Kingdom is unfettered by any conditions as to the laws which it may make (l).

(c) See 9th edit. 1946.

(d) Statute Law 1881.

(e) 1st edit. 1890; 2nd edit. 1903; 3rd edit. 1952 (in the press). From 1947 onwards a complete collection of judicial interpretations is contained in the "Current Law" Year Books and in Current Law.

(f) Published in 1922. In the Legislation of Edward I (1949), the same learned author shows that there were fundamental differences between statutes as now understood and those of the reign of Edward I which contemporaries regarded as modifications of custom rather than as commands of a sovereign legislator imposed upon the common law from outside.

(g) A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law: 2nd edit. by John Norton Pomeroy, 1874.

(h) *L. c. p. 17*; and see pp. 19, 20.

(i) Sedgwick, *l. c. p. 17*. See also pp. 173—186, where the power of the Judges to interpret laws is elaborately discussed. In *United States v. McRae* (1867), *L. R. 3 Ch. 79*, 86, Lord Chelmsford said, as to an Act of Congress, the meaning of which was being discussed: "It is not suggested that there are any words in the Act of Congress which bear a peculiar meaning different from the ordinary one, or that the Acts of an American Legislature have a construction peculiar to themselves. I do not see that there is any impediment to an English Judge with the Act of Congress before him construing it for himself, without further aid, just as he would an English Act of Parliament".

(k) There are also certain legal limitations on the law-making powers of all legislative bodies in the British Empire, other than the Imperial Parliament. See *post*, Part II, chap. ix.

(l) See Dicey, *Constitution*, 9th edit. (1939), p. 40. See the fetter purporting to be imposed by s. 4 of the Statute of Westminster, 1931 (Appendix C); and as to the restriction of the term "United Kingdom" to Great Britain and Northern Ireland, see s. 2 (2) of the Royal and Parliamentary Titles Act, 1927 (Appendix C).

Rules necessary for interpretation of statutes.

3. The importance of collecting together and succinctly stating the "legal rules for the interpretation of British statutes" (*m*), arises in the first place from the fact that "the subjects of this country are bound to construe rightly the statute law of the land; to aver in a court of justice that they have mistaken the law is a plea no Court is at liberty to receive" (*n*).

Difference in rules for British and other statutes.

4. Another reason is, that while all British statutes "must be construed on the same principles" (*o*), whether the objects of the statute be (like the Foreign Enlistment Act of 1819) of the utmost national importance, or whether the Act be merely an Act "regulating the merest points of practice or some such trifling matter" (*o*), those principles are not wholly the same as those which govern the construction either of Scottish or colonial statutes, or of other written instruments such as wills, or deeds, or parol agreements.

It may be said that the rules for the construction of all written instruments, whether of a public or private character, are almost, if not entirely, the same. Sir George Jessel (*p*) and Bowen, L.J., (*q*) have both expressed this view, the latter saying "The rules for the construction of statutes are very like those which apply to the construction of other documents, especially with regard to one crucial rule, *viz.*, that, if possible, the words of an Act of Parliament must be

(*m*) "Our province," said Lord Westbury, in *Williams v. Bishop of Salisbury* (1863), 2 Moore P. C. (N.S.) 375, 424, "is to ascertain the true construction of those articles of religion according to the legal rules for the interpretation of statutes." A similar phrase was adopted by Lord Blackburn in *Gardner v. Lucas* (1878), 3 App. Cas. 582 at p. 603: "we must construe the Act," said he, "according to the legal rules of construction." And in *Fletcher v. Hudson* (1880), 5 Ex. D. 287, 293, Brett, L.J., said: "We must construe Acts of Parliament according to the well-recognised rules of construction."

(*n*) *The Charlotta* (1814), 1 Dods. Adm. 387, 392, Sir W. Scott. As to the consequence of misconstruing an Order in Council, see *The Luna* (1810), Edw. 190; but a different rule appears to have been laid down by Sir Wm. Scott from that he adopted in *The Luna* in *The Acteon* (1815), 2 Dods. Adm. 48, 52; *The Oostsee* (1855), 9 Moo. P. C. 150; *The Sigurd*, [1917] P. 250; *The Bernisse*, [1921] 1 A. C. 458, 464-466, Sir Arthur Channell. In *Cooper v. Phipps* (1867), L. R. 2 H. L. 149, 170, Lord Westbury said: "It is said *Ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact: it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." Similarly, in *Spread v. Morgan* (1864), 11 H. L. C. 588, 602, Lord Westbury observed that this maxim will not be carried so far as to expect every person to know the rules of equity on a subject, for instance, like that of election. "This Court has power," said Turner, L.J., in *Stone v. Godfrey* (1854), 5 De G. M. & G. 76, 90, "to relieve against mistakes in law as well as against mistakes in fact." *Allcard v. Walker*, [1896] 2 Ch. 369. See also *Gas Light and Coke Co. v. Metropolitan Ry.* (1892), 9 T. L. R. 98.

(*o*) *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431, 537, Bramwell, B.

(*p*) Parl. Pap. 1875 (No. 208), p. 88; *Re Levy* (1881), 17 Ch. D. 746, 750.

(*q*) In *Curtis v. Stovin* (1889), 22 Q. B. D. 513, 517.

construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*." But though their opinion is valuable to correct any tendency to set up narrow distinctions, documents expressing the will of a Sovereign Legislature, and the result of political strife and compromise, can never be regarded in quite the same light as private documents, however solemnly prepared and authenticated, and Cozens-Hardy, M.R., said, "It is said that the Court draws no distinction between statutes and other written documents. I am not prepared to say that is true to the full extent" (r).

No doubt, there are certain general principles, "on which," as Lord Blackburn said in *River Wear Commissioners v. Adamson* (s), "the Courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view." But at the same time we find that with regard to each particular kind of written instrument there are certain special rules which govern their construction.

(1) *Scottish Acts*. The statute law of Scotland prior to the Union is not construed in precisely the same way as that of England. "The law of Scotland," said Lord Eldon, in *Johnstone v. Stott* (t), "admits of more departure from the letter of its statutes than we have any idea of in this country. We have seen that the Courts of that country superadded provisions to their statutes, and they also do not scruple to enforce their statutes at times as gently as the statutes admit of being interpreted. We see here, too, that a Scotch statute may be lost by desuetude." He also said, "The English lawyer feels himself much at a loss here : he cannot conceive at what period of time a statute can be held as commencing to grow into desuetude, nor when it can be held to be totally worn out. All he can do is to submit to what great authorities have declared the law of Scotland to be" (u).

(r) *Camden (Marquis) v. I. R. C.*, [1914] 1 K. B. 641, 648.

(s) (1877), 2 App. Cas. 743, 763. See also *Caledonian Ry. v. North British Ry.* (1881), 6 App. Cas. 114.

(t) (1802), 4 Paton (Sc. App.) 274, 285.
 (u) Hereon see Bell, Dict. Law of Scotland (ed. Watson), p. 377, tit. "Desuetude"; Erskine (Nicholson, 1871) pp. 19-20; Introduction to the Law of Scotland, Gloag and Henderson, 4th edit. 1946, p. 4.; *Smollett v. Buntein* (1730), 1 Paton (Sc. App.) 26 (H. L.); *Hoggan v. Wood* (1890), 17 Rettie (Justiciary) 96; *Harvey v. Farquhar* (1872), L. R. 2 H. L. (Sc.) 195, note (1), as to "notour adultery," which, although made a capital offence by the Scots Act of 1563, c. 74, has for long not been treated as a criminal offence. It is now repealed by the Statute Law Revision (Scotland) Act, 1906. It is improbable that any Court will hereafter hold any Scots Act to be in desuetude which has been omitted from the repeals effected by the Statute Law Revision (Scotland) Act, 1906, which may fairly be regarded as the indorsement by the Legislature of the opinion of the draftsman (expressed in col. 4 of the Bill as introduced) that certain enactments are obsolete or in desuetude. See the Scots Acts Revised (edit. 1908).

(2) *Dominion and Colonial Acts.* With regard to Dominion and Colonial Acts (x), it must not be assumed that the legal effect of the terms used is the same as it would be in an English statute. In *Western Counties Ry. v. Anderson* (y), Lindley, L.J., said: "The plaintiff company is governed by the laws of Nova Scotia and of Canada. . . . These laws being in the English language, this Court is, of course, competent without the assistance of Canadian lawyers to understand the meaning of the words in which these laws are expressed; but the legal effect of that meaning must be ascertained from legal experts in the colonial laws, and must not be assumed to be the same as the legal effect in this country of similar language occurring in an English Act of Parliament." In *Peterswald v. Bartley* (z), the words "duties of excise" in the Commonwealth Constitution Act, 1900 (a), were interpreted as referring to excise as understood in Australia, and not to its meaning in statutes relating to the United Kingdom.

Indian Acts. "The extent to which decisions in English Courts passed with reference to statutes of Parliament and the prerogatives of the Crown under the English law, will be a safe guide to the interpretation of Acts passed by the Indian Legislature, and the prerogatives of the Crown in India will depend very much upon the policy and course of Indian legislation and the powers of the Indian Legislature" (b).

The Judicial Committee of the Privy Council has not, however, to resort to the evidence of experts for the meaning or effect of such laws, being the supreme judicial tribunal for their interpretation (c). In *H.M. Procureur v. Bruneau* (d), where the question to be decided was as to the meaning of a certain word in the Civil Code of Mauritius (e),

(x) In *Trimble v. Hill* (1880), 5 App. Cas. 342, 344, the Judicial Committee held that in colonies where an enactment has been passed which is similar to an English enactment, if the English enactment has been judicially interpreted by an English Court of law, the colonial Courts should govern themselves by that English judicial interpretation when called upon to construe the colonial enactment. It is not unusual in colonial Acts to insert in the margin of each enactment the English enactment on which it is modelled.

(y) (1892), 8 T. L. R. 595, 597.

(z) (1904), 1 Australia C. L. R. 497, 509.

(a) 63 & 64 Vict. c. 12.

(b) *Bell v. Madras Municipal Commissioners* (1902), Ind. L. R. 25 Madras 457, 473, Bhashyam Ayyangar, J.

(c) To this there are, perhaps, two exceptions, arising from Art. 74 of the Schedule to the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), as amended by Commonwealth legislation, and from s. 106 of the South Africa Act, 1909 (9 Edw. 7, c. 9). Leave to appeal from other judgments of the High Court of Australia, or from decisions of the Supreme Court of Canada, is only sparingly given, having regard to the august character of those tribunals: *Clergue v. Murray*, [1903] A. C. 521; *Daily Telegraph Newspaper Co. v. McLaughlin*, [1904] A. C. 776; *Victorian Railway Commissioners v. Brown*, [1906] A. C. 381. But the prerogative of the Crown to admit appeals from those Courts remains unless taken away by specific legislation: see *Théberge v. Laundry* (1876), 2 App. Cas. 102; *Moses v. Parker*, [1896] A. C. 245; *Re Wi Matua's Will*, [1908] A. C. 448; *Lord Strickland v. Grima*, [1930] A. C. 285. See *post*, Part II, chap. viii, as to effect of Statute of Westminster.

(d) (1866), L. R. 1 P. C. 169, 191.

(e) As to the sources of the law of this colony, see Preface to Mauritius Laws (edit. 1897).

the Judicial Committee had in the first place “to ascertain the general principles by which the [French] Courts are governed in the construction of the Code”; and, having ascertained these principles, they then had to apply them in interpreting the particular word in dispute. But where the law of the colony is based on the common or statute law of England, no reason exists for any exceptional rule.

Comparison with construction of contracts and wills.

5. (a) *Contracts*. In the construction of a contract there cannot be said to be any rules of law applicable, but “the governing principle is to ascertain the intention of the parties to the contract through the words they have used” (f), which words “are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found” (g). Lord Wright has recently said: “I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law . . . the decision as to each must depend on the consideration of the parties’ contract read in the light of the material circumstances of the parties in view of which the contract is made” (h). It is seldom, in construing “mercantile contracts, that any technical or artificial rule of law can be brought to bear on their construction; the question really is the meaning of the language” (i), and “the grammatical meaning is, as in other cases, the meaning to be adopted, unless there be reason to the contrary” (k).

Decisions upon the construction of deeds and contracts are not further referred to in this work, because they are rarely of any assistance in construing an Act, save so far as they evidence contemporary exposition or the practice of conveyancers as interpreting a statute long in force. The difficulty of applying such decisions is, that the deeds may be drafted to evade the Act in question or with intentions quite irrespective of the Act.

The Judicial Committee recently had before it a case from Canada where the Government of a Province had in a statute held out an exemption from taxation as an inducement to a railway company, and Lord Greene said: “They [their Lordships] cannot agree that a section of an Act of Parliament is to be regarded as an offer by the Executives and there can be no question of an offer by the Legislature which no one suggests could become a party to the supposed contract. Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct. Parliament

(f) *M’Connel v. Murphy* (1873), L. R. 5 P. C. 203, 218.

(g) *Lord v. Sydney Commissioners* (1858), 12 Moore P. C. 473, 497.

(h) *Luxor (Eastbourne) Ltd. v. Cooper*, [1941] A. C. 108, 130.

(i) *M’Connel v. Murphy*, *supra.* at p. 219.

(k) *Southwell v. Bowditch* (1876), 1 C. P. D. 374, 376, Jessel, M.R. For the Rules of Construction of Deeds and Contracts see Elphinstone, 7th edit., p. 19, and Norton on Deeds, 2nd edit., chaps. iii, iv, v, vi, and viii. Odgers, Construction of Deeds and Statutes, 2nd edit., 1946.

could no doubt enact that a section of a statute should have the force of an offer by the Crown capable of being accepted by a subject " (l).

In *Reid v. Reid* (m) the Court rejected as useless for the construction of the Married Women's Property Act, 1882, decisions as to the meaning of covenants (n) in marriage settlements, on the ground that such cases must be approached with a presumption that they were intended to exclude the husband from acquiring the property of his wife if it should fall into possession during coverture; whereas, in dealing with the Act, no such presumption arose. And in *Midland Ry. v. Robinson* (o), in construing the word " mines " in the Railways Clauses Act, 1845, Lord Herschell said : " In dealing with this case, it must be remembered that all your lordships have to do is to interpret the words of the enactment, and not to lay down, even if it were possible, any general rule as to the interpretation of the word ' mines '. I doubt whether much assistance is to be obtained from cases in which a construction has been put upon that word in instruments embodying merely agreements between the parties to them, unaffected by any statutory enactment. In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such a manner as is consistent with the surface remaining undisturbed ".

(b) *Wills*. With regard to the construction of wills, although the rules as to the interpretation of statutes and of wills are, to a certain extent, analogous, and although some Judges have stated that, in their opinion, " a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents and not according to artificial rules " (p), there are to be observed " many and striking discrepancies, such, for instance, as the rules which govern the evidence to be admitted in explaining ambiguities in wills, the arbitrary principles which have been adopted for their construction, and the vague discretion exercised by the Courts under the name of the doctrine of *cy-près* " (q). Decisions on the

(l) *Att.-Gen. for British Columbia v. Esquimault and Nanaimo Ry.*, [1950] A.C. 87 at p. 110.

(m) (1886), 31 Ch. D. 402.

(n) S. C., p. 410, Fry, L.J.

(o) (1889), 15 App. Cas. 19, 27.

(p) In *Grant v. Grant* (1870), L. R. 5 C. P. 727, Blackburn, J., approved his statement in Blackburn's Contract of Sale, p. 49 : " A will is the language of the testator, soliloquising, if one may use the phrase, and the Court, in construing his language, may properly take into account all he knew at the time, in order to see in what sense the words were used ". And in *Biddulph v. Lees* (1858), E. B. & E. 289, 317, Martin, B., cited with approval the rule for the construction of wills enunciated by Lord Kingsdown in *Towns v. Wentworth* (1858), 11 Moore P. C. 526, 543; see also *Re Bedson's Trusts* (1885), 28 Ch. D. 523, 525, Brett, M.R. " The authorities show conclusively that the same principles apply in construing a deed and in construing a will ": *Re Friend's Settlement*, [1906] 1 Ch. 47, 52, Farwell, J., who stated and followed the opinions of Lords St. Leonards and Brougham in *Cole v. Sewell* (1848), 2 H. L. C. 186.

(q) Sedgwick, p. 223.

construction of wills are, therefore, of little or no value in interpreting statutes.

Rules of law and rules of construction distinguished.

6. Sir H. Elphinstone has pointed out (*r*) with reference to deeds the distinction between rules of law and rules of construction. A rule of law, *e.g.*, the rule in *Shelley's Case*, exists independently of the circumstances of the parties to a deed, and is inflexible and paramount to the intention expressed in the deed. A rule of law cannot be said to control the construction of a statute, inasmuch as a British statute is itself part of the supreme law of the land and overrides any pre-existing rules with which it is inconsistent. A rule or canon of construction, whether of will, deed or statute, is not inflexible, but is merely a presumption in favour of a particular meaning in case of ambiguity. In *L. N. W. Ry. v. Evans* (*s*), this has been well expressed by Bowen, L.J., with reference to the question whether it was intended by a private Act to grant a right of support by subjacent strata to a railway constructed under statutory powers: "When we pass from private grants between individuals to titles and rights created by an Act of Parliament, the exact subject-matter is altered, but similar rules of good sense and law obtain when we have to interpret sections which do not expressly decide the matter. These canons do not override the language of a statute where the language is clear: they are only guides to enable us to understand what is inferential. In each case the Act of Parliament is all-powerful, and when its meaning is unequivocally expressed the necessity for rules of construction disappears and reaches its vanishing point".

This description of a rule of construction has been substantially recognised in legislation both by the form in which interpretation clauses are usually drafted and by the Interpretation Act, 1889 (*t*), which, though mainly intended as an aid to the draftsmen of future Acts and to facilitate the expurgation and revision of the Statute book, has given statutory authority to a series of rules of construction, not as being inflexible rules of law, but as presumptively applicable "unless a contrary intention appears"; and it is doubtful whether it is safe to lay down beforehand general canons of construction by reference to which the objects of future statutes are to be defined—other than those applicable to all documents (*u*).

Cases upon statutes classified.

7. "It seldom happens that the framer of an Act of Parliament has in contemplation all the cases that are likely to arise under it,

(*r*) On Interpretation of Deeds, 1885, Pref., p. v. See Elphinstone, chap. ii, and 1 L. Q. R. 466.

(*s*) [1893] 1 Ch. 16, 27.

(*t*) 52 & 53 Vict. c. 63, *post*, Appendix B.

(*u*) *Lamplugh v. Norton* (1889), 22 Q. B. D. 452, 459, Bowen, L.J.

therefore the language used seldom fits every possible case" (x); consequently the difficulties as to the interpretation of statutes "consist chiefly in the application to various and complicated circumstances of words which are of a wide and general meaning" (y), and very many of the difficulties in construing Acts of Parliament arise from the fact that the particular point under consideration was not present to the mind of the draftsman when he drew the Act (z). Such cases, therefore, are simply decisions upon the language used in the particular statute as applied to the particular case under consideration, and can be only to a very slight degree useful for the purpose of elucidating the general rules upon which statutes are to be construed (a).

The cases upon statutes, which yearly occupy a larger portion of the reports, fall into three classes—

- (1) Those which lay down general rules of construction;
- (2) Those which decide on the applicability of the established rule to particular enactments; and
- (3) Those which decide whether the accepted construction of an enactment includes or excludes a particular set of facts.

When the meaning of an Act is settled, a merely illustrative decision may require record, but its details are usually unimportant (b), and those decisions alone are of general importance which accurately and succinctly state the general rules of construction, and point out the proper methods of applying them to each enactment which calls for judicial interpretation, and the limits of their applicability. It is necessary to keep in view the caution of Cotton, L.J., in *Reid v. Reid* (c). "The question for our consideration is, what is the true meaning of the language which the Legislature has employed? Cases on the construction of other Acts or instruments generally give very little help to the Court, but if there is any principle laid down we ought not to disregard them in considering a different Act or instrument."

But in the case of statutes consolidating former law or adopting from former Acts words which have been judicially construed, the

(x) *Scott v. Legg* (1876), 2 Ex. D. 39, 42, *per curiam*.

(y) *Att.-Gen. v. Cecil* (1870), L. R. 5 Ex. 263, 270, Kelly, C.B.

(z) *Clementson v. Mason* (1875), L. R. 10 C. P. 209, 221, Denman, J.

(a) See *Fishburn v. Hollingshead*, [1891] 2 Ch. 371; and 6 L. Q. R. 301.

(b) Sedgwick, pp. 254, 311, 316, cites and comments upon many cases where the only point to be determined was how to apply a particular enactment to a particular set of circumstances, with a view to proving that the Courts still decide cases upon what is called the equity of the statute (see *Vernon's Case* (1572), 4 Co. Rep. 1 a, 4 a, and *post*, p. 95); but it will be found, if these cases are examined, that no reasons are given by the Courts for those decisions, and that in fact they merely decided as they considered best under the particular circumstances; for, as Hannen, J., observed in *R. v. Surrey* (1870), L. R. 5 Q. B. 87, 93, "the intention of the Legislature must depend to a great extent upon the particular object of the statute that has to be construed". In 1827 Lord Tenterden said, "I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of the statute . . .", *Brandling v. Barrington* (1827), 6 B. & C. 467, 475, and Byles, J., in *Shuttleworth v. Le Fleming* (1865), 19 C. B. (N.S.) 687, 703, thought that "within the equity" of a statute meant being "within the mischief" of it. See also *Lucas v. Dixon* (1889), 22 Q. B. D. 357, 359, Lord Esher, M.R.

(c) (1886), 31 Ch. D. 402, 405.

case law on the enactments consolidated or copied may be of great value in interpretation (*d*); and in the case of the adoption by a Dominion or Colonial Legislature of the substance of a British statute the same may be said. And in the interpretation of the Constitution of the Australian Commonwealth it has been held reasonable to infer that when the framers of that instrument inserted provisions indistinguishable in substance, though varied in form, from the provisions of other legislative enactments which had received judicial interpretation, they intended that such provisions should receive like interpretation (*e*).

To attempt to collect all these decisions would entail a labour disproportionate to the result, for in a large number of such cases the statutes in question have been repealed (*f*), and, where they are still in force, the particular points in dispute are extremely unlikely to occur again, and the decisions are found easily in treatises relating to the branch of law dealt with by the particular Act. This work is therefore confined to the enunciation of general principles of construction, and no attempt is made to collect all the decisions of the Courts upon mere words. But in the chapter on the Interpretation of Words (*post* p. 150) are collected such judicial *dicta* as seem to explain on what principles the meaning of words used in statutes is to be arrived at (*g*).

Strict and liberal construction.

8. It has been usual in treatises on the interpretation of statutes to distinguish between strict and liberal construction, and to specify what kind of statutes are commonly construed strictly, and what kind are construed liberally. The rules on this head are extremely vague, if, indeed, it can be said that there are any rules at all (*h*); the truth

(*d*) *Ex p. Campbell* (1870), L. R. 5 Ch. App. 703, 705, James, L.J.; *Barras v. Aberdeen Steam Trading and Fishing Co.*, [1933] A. C. 402, 411, Lord Buckmaster. *Nadarajan Chettiar v. Walaawa Mahatmee*, [1950] A. C. 481.

(*e*) *D'Ernden v. Pedder* (1904), 1 Australia C. L. R. 91, 112, Griffith, C.J. Under this ruling the High Court of Australia interpreted the Commonwealth Constitution by reference to decisions on the corresponding parts of the United States Constitution, e.g., following *McCulloch v. Maryland* (1819), 4 Wheat. U. S. 2. See *Sydney Municipal Council v. Commonwealth* (1904), 1 Australia, C. L. R. 208, 239, O'Connor, J. This mode of interpretation was disapproved by the Judicial Committee in *Webb v. Outrim*, [1907] A. C. 81, 88-90 and by the High Court itself in *The Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.* (1920), 28 Australia C. L. R. 129, and *N. S. W. v. Commonwealth* (1932), 46 C. L. R. 155. Cp. *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, at p. 587, and p. 480 *et seq.*, *post*.

(*f*) Statutes are often passed to override decisions on the construction of prior statutes, e.g., *Townend v. Cox*, [1907] A. C. 514, 518, (the Gaming Act, 1922); *Pontypridd and Rhondda Joint Water Board v. Ostime*, [1946] A. C. 477 (Finance Act, 1946, s. 61). For an unsuccessful attempt to legislate in this manner, see *Toronto Corporation v. Toronto Ry.*, [1910] A. C. 312.

(*g*) Stroud's Judicial Dictionary gives the interpretation put judicially upon a very large number of words.

(*h*) See *Ex p. Milne* (1889), 22 Q. B. D. 685, 695, Esher, M.R.; and Dwaris, chap. ix; Sedgwick, pp. 256—316. In *Hill v. Metropolitan Asylums Board* (1879), 4 Q. B. D. 433, 442, Pollock, B., said: "It is a dangerous doctrine, and one contrary to the true rules of construction, to require or allow a Judge to give an effect to the same words wider or narrower in proportion as he might think the general scope of the Act in which they were found of great or small public importance." In *N. E.*

being that, "The judges have perpetually taken refuge in the clouds and mist of strict and liberal interpretation whenever they have been pressed by the hardship or injustice of a particular case" (i); and, as Lord Hobart said in *Sheffield v. Ratcliffe* (k), "If you ask me by what rules the Judges guided themselves in diverse expositions of the self-same word and sentence, I answer, it is by that liberty and authority which Judges have over statute laws according to reason and best convenience to mould them to the truest and best use."

In this treatise a different plan has been adopted, namely, in the first instance to lay down as precisely as possible the rules which regulate the construction of all statutes, the language of which is clear and unequivocal, and then, in the next place, to state in what way the meaning of obscurely worded statutes may legitimately be arrived at. By dealing with the subject in this way, it is hoped that it will be found that all the various rules which exist with regard to the interpretation of statutes are stated as plainly as the nature of the case will permit.

Judicial authority to interpret statutes.

9. The rules enunciated in this treatise as to the interpretation and effect of statutes are in the main taken from the decisions of the Courts of law or the *dicta* of the Judges. Parliament has power to declare by statute the common law or the meaning of any prior statute, and may declare wrong or repeal any judicial legislation effected by interpretation or misinterpretation of statutes, and may make the declaratory or repealing enactment retrospective. But subject to this power the interpretation of statutes is within the special province and under the exclusive control of the Judicature, a control exercised only in the course of a legal proceeding and generally only upon examination of the terms of the statute itself (l).

As Eyre, C.J., pointed out to the House of Lords in *Home v. Lord Camden* (m), the duty of expounding Acts of Parliament devolves solely upon the "King's temporal Courts, and your Lordships in the last instance" (n). That duty was once claimed as a right by James I, and Coke reports (o) the opinion on the point which he delivered, "with the clear consent of all the Judges of England and the Barons of the Exchequer," to the effect that "the King in his own person cannot

Ry. v. Leadgate (1870) L. R. 5 Q. B. 157 at p. 168; Cockburn C.J., said: "I regret I cannot see my way to putting such a construction on section 55 (of the Local Government Act, 1858) as would meet the equity of the case. . . ."

(i) Sedgwick 307.

(k) (1616), Hob. 334, 346.

(l) See Dicey, Constitution, 9th edit. 407.

(m) (1795), 6 Bro. Parl. Cas. 203; 1 H. Bl. 476; 2 *ib.* 533.

(n) "A Judge is theoretically bound to take judicial notice of all Acts of Parliament," he is bound also "theoretically to know the contents of them all," and consequently it may not be assumed, when not disputed by the pleadings, that a right has been created by an Act of Parliament which, as a matter of fact, has not been so created, for the Judge is "theoretically bound to be aware that there is no such Act of Parliament": *Chilton v. Corporation of London* (1878), 7 Ch. D. 735, 740, Jessel, M.R.

(o) *Prohibitions del Roy* (1607), 12 Co. Rep. 63.

adjudge any case." "The province of the Legislature," as the Court of Exchequer said in *Russell v. Ledsam* (*p*), "is not to construe, but to enact, and their opinion, not expressed in the form of law as a declaratory provision would be (*q*), is not binding on Courts whose duty it is to expound the statutes they [the Legislature] have enacted." It would be no easy task (*r*) to ascertain at what period and by what means the Courts of law obtained the right of being the sole expositors of the statutes of the realm. In the early ages of the English system it appears that the line between the Judiciary and the Legislature was not distinctly marked (*s*). Originally the Houses of Lords and Commons sat together, and the Courts of law were clearly subordinate to the Parliament. A writ of error lay from them to the Parliament, and they were accustomed even to consult Parliament before they decided points of difficulty and importance (*t*). But it is now one of the axioms of our law that it is not only "the right," but also the duty of the Judiciary to expound and interpret doubtful provisions of our legislative enactments (*u*).

The sole judicial authority ultimately competent to construe a statute extending to the whole or to any part of the United Kingdom is the House of Lords (*w*).

The interpretations, whether of the Crown itself or of officers or Departments of State, or of resolutions of one House of Parliament (*x*), or of subordinate judicial authorities, ecclesiastical or temporal, unless declared by statute to be final and conclusive, must yield to the judicial interpretation of the Supreme Court and of the House of Lords, which will not adopt an erroneous construction, of however long standing, unless it justifies the application of the principle *communis error facit jus*. Coke (*y*), in speaking of judicial authority, said :

(*p*) (1845), 14 M. & W. 574, 589, Parke, B.

(*q*) See below, p.137, where the meaning of the phrase "parliamentary exposition of a statute" is explained.

(*r*) "We have no means of tracing the manner in which the transfer of authority to the Judges was effected, but at a very early day we find it asserted in more than its present plenitude": Sedgwick 174; see also Dwaris, pp. 708, 792.

(*s*) Sedgwick, p. 18.

(*t*) Per Sir J. Campbell, *arguendo* in *Stockdale v. Hansard* (1837), 9 A. & E. 1, 23; 3 St. Tr. (N.s.) 723.

(*u*) Sedgwick, p. 173. And cf. *Sheffield v. Ratcliffe* (1616), Hob. 346 (cited in *Att.-Gen. v. Pougett* (1816), 2 Price 381, 388) Lord Hobart in answer to the inquiry by what rule Judges were guided in expounding statutes, p. 11, *supra*. But the Court must be Judges, and not lawgivers: Erskine, *Inst. Law Sc.* 1, 1, 50.

(*w*) See *Macbeth v. Chislett*, [1910] A. C. 220, 224. The House of Lords also will apply what it considers a correct decision of the Courts of one part of the United Kingdom to enactments in similar terms applying to another part: *S. Pearson & Son, Ltd. v. Dublin and S. E. Ry.*, [1909] A. C. 217, 224, Lord Macnaghten.

(*x*) Dicey, *Constitution*, 9th edit. 55. In the South African Republic resolutions of the Volksraad were declared to be equivalent to laws. Within a certain limited sphere by the law or custom of Parliament resolutions of either House, though not statutes or laws, are only in a very limited sense subject to revision or disregard by the ordinary Courts of law. That sphere is that within which either House acts in exercise of its privilege to regulate its own internal concerns or to enforce its authority. Dicey, *Constitution*, 55 *et seq.*; *Stockdale v. Hansard* (1839), 9 A. & E. 1; *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271; *Att.-Gen. v. Bradlaugh* (1884), 14 Q. B. D. 667.

(*y*) 2 Inst. 618.

"Which answers and resolutions, although they were not enacted by authority of Parliament, as our statute of *Articuli cleri* in 9 Edw. 2 was : yet being resolved unanimously by all the Judges of England and Barons of the Exchequer, are, for matters in law, of highest authority next to the Court of Parliament" (z).

Departments of State. The Legislature has in recent years tended to substitute departments of State for Courts of law in dealing with certain classes of questions, and it appears to be a fundamental principle of English administrative law that departmental policy is a matter for Parliament and the Courts will not interfere in it. Enactments are passed giving appeals on matters affecting individual rights to a department of State instead of to a judicial tribunal (a), and empowering administrative authorities to act in a judicial or quasi-judicial manner independent of control by the Higher Courts. But unless the words of the statute clearly exclude its jurisdiction (b), the High Court treats such authorities as inferior tribunals subject to its control, and will review and correct their erroneous interpretations of statutes.

In *R. v. Board of Education* (c), a case on section 7 (d) of the Education Act, 1902, the Court of Appeal affirmed an order for a mandamus to the Board of Education made by the King's Bench Division (e). Cozens-Hardy, M.R., said: "In my opinion . . . there is nothing in that section which enables the Board of Education to decide an abstract question of law, or anything else than a question of fact, although the question of fact may involve the consideration of the true meaning and effect of the Act of Parliament itself. It does not enable the Board of Education to legislate, and if its decision is based on a wrong interpretation of the statute I think it is not absolute in the sense that no Court can interfere with or review it. In all matters of fact not involving a wrong construction of the statute, the decision of the Board of Education will be final. If, however, as in the case of *Wilford v. West Riding of Yorkshire County Council* (f), the Board of Education gives a decision which proceeds upon a wrong interpretation of the statute, such as the meaning of the word 'maintain,' the decision is not conclusive, and it is competent to the Court to take action,

(z) One of the resolutions referred to was that the interpretation of statutes concerning the clergy belongs to the Judges of the Common Law. See *R. v. Dibdin*, [1910] P. 57.

(a) See the Town and Country Planning Act, 1947, s. 16; under which a person aggrieved by the refusal of a planning permission or by the grant of a planning permission subject to conditions may appeal to the Minister of Town and Country Planning. The whole subject is dealt with at length, Part II. chap. 3, *post*.

(b) *Albon v. Pyke* (1842) 4 M. & G. 421, 424, Tindal, C.J.

(c) [1910] 2 K. B. 165. See *R. v. The Local Government Board, Ex p. Arlidge*, [1914] 1 K. B. 160; [1915] A. C. 120; *R. v. Port of London Authority* (1918), 88 L. J. K. B. 553; and *R. v. Tribunal of Appeal under the Housing Act, 1919*, [1920] 3 K. B. 334.

(d) Sub-s. 3 provides that "if any question arises under this section between the local education authority and the managers of a school not provided by that authority, that question shall be determined by the Board of Education."

(e) [1909] 2 K. B. 1045.

(f) [1908] 1 K. B. 685.

notwithstanding the decision of the Board of Education, to do what is right between the parties."

On a like principle in *R. v. Treasury* (g), a mandamus was issued to the Commissioners of the Treasury to determine the proportions payable from money payable by Parliament and from the police pension fund of a county to the pension of a police officer, the Court taking the view that the Police Act, 1890, simply imposed on the Treasury the duty of determining such proportions according to law, and that a mandamus lay to set in motion the only procedure by which the respective liabilities to pay could be determined (h).

And in *Re Weir Hospital* (i) the Court held that the Charity Commissioners had entirely misapprehended their duties and powers as to framing schemes under the Charitable Trusts Act, 1860 (j).

Special tribunals. There is also a tendency to substitute special tribunals for the Courts of law to deal with certain questions of law or of fact. An example is to be found in the Railways Act, 1921 (k), by sections 42 and 43 of which a Rates Tribunal (l) is set up which has to consider, among other things, the reasonableness of conditions on which railway companies undertake to carry merchandise. The question of "reasonableness" was formerly a question of law for the Courts (m), but now the conditions settled by the Tribunal "shall be deemed to be reasonable."

The most recent of these special tribunals and one with an important jurisdiction is the Lands Tribunal (n).

Ecclesiastical Courts. Ecclesiastical Courts have power to construe a statute which comes incidentally before them in the course of a proceeding which is within their jurisdiction (o). But the construction adopted does not bind the temporal Courts, whose special province it is to expound the statute law; and "the possibility," as the Judges pointed out in *Home v. Lord Camden* (p), "of two different rules prevailing upon the same law, one in the King's temporal Courts, and the other in Courts of peculiar jurisdiction, is effectually prevented, without any unreasonable interference

(g) [1909] 2 K. B. 183.

(h) To justify the issue of the mandamus it was necessary to correct the construction put by the Treasury on ss. 14, 33 of the Police Act, 1890.

(i) [1910] 2 Ch. 124.

(j) The scheme in question was declared *ultra vires* as contravening the rules judicially laid down as to the application of the *cy-près* doctrine to charitable trusts.

(k) 11 & 12 Geo. 5, c. 55.

(l) Now the Transport Tribunal: Transport Act, 1947 (10 & 11 Geo. 6, c. 49), s. 72.

(m) By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7. See *Peek v. North Staffordshire Ry.* (1863), 10 H. L. C. 473.

(n) Lands Tribunal Act, 1949 (12 & 13 Geo. 6, c. 42). See as to special tribunals the Report of the Ministers' Powers Committee, 1932 (Cmd. 4060).

(o) *Hall v. Maule* (1838), 7 A. & E. 721; *R. v. Dibdin*, [1910] P. 57, affd. [1912] A. C. 533. Certiorari will not lie to an ecclesiastical Court as it is not an inferior court, though prohibition may lie. *R. v. St. Edmundsbury and Ipswich Diocese (Chancellor)*, [1947] K. B. 263, affd. [1948] 1 K. B. 195, cf. 63 L. Q. R. 208.

(p) (1795), 2 H. Bl. 536.

or breaking in upon the Courts of peculiar jurisdiction, by the temporal Courts issuing their prohibitions in every such case. And this is no more than saying, 'proceed to the very extent of your jurisdiction without interference from us, only remembering that . . . when any question arises touching the exposition of the statute law, if the subject is originally of temporal jurisdiction and comes incidentally before you, it is to be expounded by you as we expound it, or if the statute concerns your proceedings only, you are to expound it as we say it ought to be expounded, when the question is brought before us in prohibitions' " (q). Therefore, even with regard to the exposition by ecclesiastical Courts of Acts of Parliament which relate exclusively to ecclesiastical matters, the ecclesiastical Courts must accept the interpretation put upon the statute by the temporal Court. Coke (2 Inst. 601) says that this was stated as their opinion "by all the Judges of England and the Barons of the Exchequer upon mature deliberation and consideration with one unanimous consent," in answer to certain questions put to them by the Lords of the Council with respect to the complaint exhibited by Archbishop Bancroft in the name of the whole clergy, in Michaelmas Term, *anno* 3 Jac. 1 (1605). The complaint was "that no temporal Judges, under colour of authority to interpret statutes, ought, in favour of their prohibitions, to make causes ecclesiastical to be of temporal cognisance." To which the answer was, "that as for the Judges' expounding of statutes, which concern the ecclesiastical government or proceedings, it belongeth to the temporal Judges." And, after setting out the whole of these complaints and the answers thereto, Coke adds (at p. 618): "We will now proceed to the exposition of the same [*i.e.*, 9 Edw. 2], which office the clergy claimed, viz., to interpret all statute laws concerning the clergy; but it was resolved by all the Judges of England, that the interpretation of all statutes concerning the clergy, being parcel of the laws of the realm, do belong to the Judges of the common law." It is, in fact, now well settled, that if ecclesiastical Courts are called upon to construe statutes, on whatever subject, they are bound to construe them upon the same principles as the Courts of common law (r).

(q) See *R. v. Dibdin*, [1910] P. 57, where the temporal Courts, on a rule for a prohibition to the Dean of Arches considered whether the English legislation on marriage dealt with marriage as a civil contract or recognised it as having sacramental qualities, and decided that s. 1 of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), did not authorise a clergyman of the Church of England to repel from the Eucharist a man who had married his deceased wife's sister.

(r) These decisions were given with reference to the relations of the superior Courts of common law to Courts of limited or special jurisdiction, such as the Court of Admiralty, or to local Courts of record, or to Courts of ecclesiastical jurisdiction. Under the modern judicial system the powers of review over inferior Courts are clearly established, and therewith the authority of the Supreme Court to review and correct any erroneous reading of a statute by an inferior Court, or by any public department or official acting in a judicial capacity: see *R. v. Board of Education*, [1909] 2 K. B. 1045; [1910] 2 K. B. 165, p. 13 *ante*. The jurisdiction of ecclesiastical Courts has been in part transferred to the Supreme Court, in part extinguished; and as to the rest, except where temporal matters are involved, is under review by the Judicial Committee of the Privy Council.



"Whatever," said Lord North, in *Carter v. Crawley* (s), "is determined by the common law to be the true meaning of this Act, must be a rule to the ecclesiastical Courts, for the Courts of common law are intrusted with the exposition of Acts of Parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the King's Courts to be the true meaning of the Act." This was finally decided in *Gould v. Gapper* (t). In that case it was contended that the misconstruction of a statute by an ecclesiastical Court was matter of appeal and not of prohibition. Lord Ellenborough, however, in an elaborate judgment, in which he reviewed all the previous authorities, held otherwise, on the broad ground that the Courts of common law have in all cases, in which matter of a temporal nature has incidentally arisen, granted prohibitions to Courts acting by the rules of the civil law, where such Courts have decided on such temporal matters in a manner different from that in which the Courts of common law would decide the same (u). The result of these decisions is twofold : (1) That judgments of ecclesiastical Courts and even, it is submitted, of the Judicial Committee on appeal from them, as to the construction of statutes, are not conclusive upon the Supreme Court or the House of Lords (x). (2) That the High Court has authority to interfere by prohibition or mandamus when an ecclesiastical Court construes a statute otherwise than in accordance with the principles acted upon by the Supreme Court, if the effect of such construction is to lead the ecclesiastical Court to assume a jurisdiction not given to it or to deprive a suitor of a right secured to him by common law or statute (y). And this jurisdiction has in recent years been invoked by ecclesiastics who hold strongly the incompetence of temporal Courts in ecclesiastical matters (z).

Uniformity of interpretation.

10. The marked tendency of judicial decisions is to render uniform for all the King's dominions the rules relating to the construction of

(s) (1681), Sir T. Raym. 496.

(t) (1804), 5 East 345.

(u) The importance of this rule has been accentuated by *Read v. Bishop of Lincoln* (1888), 13 P. D. 221; 14 *ib.* 148; [1892] A. C. 644. The Prayer Book (14 Car. 2, c. 4, s. 1; 1 Rev. Stat. (2nd edit.) 633, n.), and Articles of Religion (13 Eliz. c. 12; 14 Car. 2, c. 4, s. 26), are scheduled to Acts of Parliament. In *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214, and in *Allcroft v. Bishop of London*, [1891] A. C. 666, the supremacy of the temporal Courts in matters regulated by statute over the ecclesiastical Courts was fully recognised, and the bishops were regarded as standing much in the position of justices of the peace as to the exercise of their functions. Cf. *R. v. St. Edmundsbury and Ipswich Diocese (Chancellor)*, [1947] K. B. 263, affd. [1948] 1 K. B. 195. In matters relating to Convocation and its mode of election, the temporal Courts have no jurisdiction, e.g., where the Archbishop decided that a candidate elected to represent an archdeaconry in the Lower House was disqualified: *R. v. Archbishop of York* (1888), 20 Q. B. D. 740.

(x) *Mackonochie v. Lord Penzance* (1881), 6 App. Cas. 424, 447, Lord Blackburn.

(y) See *Veley v. Burder* (1841), 12 A. & E. 265, 309 ff. Tindal, C.J.; *R. v. Archbishop of Canterbury*, [1902] 2 K. B. 503; *R. v. Dibdin*, [1910] P. 57.

(z) *Mackonochie v. Lord Penzance, ubi sup.*; *Combe v. De la Bere* (1881), 22 Ch. D. 316; *Enraght v. Lord Penzance* (1882), 7 App. Cas. 240; *R. v. Dibdin, ubi sup.*

statutes (a). As Lord Watson said in *Cooper v. Cooper* (b), the House of Lords is the *commune forum* of England, Scotland and Ireland, and takes judicial notice of the law of each country in an appeal from the other (c). In dealing with the statutes common to the whole United Kingdom, the House of Lords has to lay down rules applicable to all those countries alike, and to consider and reconcile, or select from, conflicting decisions of English, Scottish and Irish Courts upon such enactments (d). So in *Income Tax Commissioners v. Gibbs* (e), Lord Simon, L.C., adopted a construction of a taxing statute which would avoid inequalities in taxation in England and Scotland as the statute applied to both countries.

The Judicial Committee of the Privy Council is in a like manner the *commune forum* for the rest of the Empire (f). The decisions of these august Courts tend to restrain any disposition of subordinate Courts in different parts of the Empire to set up divergent rules of interpretation, and to produce practical uniformity as to such rules. Where such restraint cannot be imposed, in some cases the different moral sentiment in different parts of the United Kingdom has led to a different construction of the same statute. This is conspicuously illustrated by the divergence between the English and the Scottish and the Irish Courts on the application of section 2 of the Cruelty to Animals Act, 1849, to the dishorning of cattle (g).

(a) See *Income Tax Commissioners v. Pemsel*, [1891] A. C. 532, 557, 577, Lords Watson and Macnaghten; and *per* Lords Cottenham and Brougham in *Duncan v. Findlater* (1839), 6 Cl. & F. 894, 902, 909, where it was unsuccessfully argued that to adopt English decisions on a statute applying to Great Britain and Scotland, which conflicted with Scottish decisions on the same Act, was an attempt to overrule Scottish in favour of English law.

(b) (1888), 13 App. Cas. 88, 104.

(c) See *Ewing v. Orr-Ewing* (1884), 9 App. Cas. 34; (1885), 10 App. Cas. 453.

(d) English Judges have differed as to whether they are bound by Scottish decisions on an Act common to England and Scotland: see *Blake v. Midland Ry.* (1852), 18 Q.B. 93, 109, Coleridge, J.; *Ford v. Wiley* (1889), 23 Q. B. D. 203, 216, Coleridge, C.J. The true rule seems to be that such decisions are not binding in the same sense as those of English Courts of concurrent or superior jurisdiction; but that expediency and comity are in favour of their acceptance until the House of Lords decides the matter finally. In the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), it was recognised by Parliament that the Courts of England, Scotland, or Ireland might differ as to the interpretation of the Act. See s. 17 (5). Cf. the decision on Scots law in *Cantiare San Rocco v. Clyde Shipbuilding Co.*, [1924] A. C. 226, 247, 248, with *Chandler v. Webster*, [1904] 1 K. B. 493, since overruled in the *Fibrosa Case*, [1943] A. C. 32, cf. also Law Reform (Frustrated Contracts) Act, 1943.

(e) [1942] A. C. 402, 414.

(f) The Courts from which and the conditions under which appeals lie are stated in Bentwich, Privy Council Practice, 3rd ed., 1937, and the Orders in Council regulating appeals, made in 1908 and 1909: St. R. & O. 1908, p. 405; 1909, p. 417. As to the history of appeals from Australia to the King in Council, see *Parkin v. James* (1905), 2 Australia C. L. R. 315, 330, Griffith, C.J.; *Minister for Army v. Parbury, Henty & Co.* (1945), 70 Australia C. L. R. 459, 497. As to appeals from the Supreme Court of Canada, see *Clergue v. Murray*, [1903] A. C. 521; and from the High Court of Australia, see *Victorian Railway Commissioners v. Brown*, [1906] A. C. 381. See further as to appeals to the Judicial Committee, limited in recent years, Part II, chap. ix.

(g) *Ford v. Wiley* (1889), *supra*, which conflicts with *R. v. M'Donagh* (1891), 28 L. R. Ir. 204; *Renton v. Wilson* (1888), 15 Rettie (Justiciary Sc.) 84; and *Todrick v. Wilson* (1891), 18 Rettie (Justiciary Sc.) 41.

CHAPTER II

THE DRAFTING OF STATUTES

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Precise form not necessary.

1. "The Legislature," said the twelve Judges in *Longmead's Case* (a), "when they intend to pass, to continue, or to repeal a law, are not bound to use any precise form of words." Consequently we find that at different periods of English history statutes have been drawn in different ways and according to different methods.

Drafting of early statutes.

2. (1) *By Judges*. Till 1487 the Judges, as a rule, drafted the statutes in Latin or Norman French by the light of the Parliament Rolls, which were not engrossed until the conclusion of each Parliament. In other words, the Houses of Parliament, or one of them, petitioned for remedy of a particular grievance, but left the terms of the remedial Act to the King in Council (b). The statutes, when drafted, were engrossed on the statute roll now preserved in the Record Office. "Parliament recognised that those who administered the law were supposed to have a real, and not a merely nominal, hearing in the making of laws" (c). That the Judges believed their right to be constitutional appears from the fact that the Chancellor and the Judges (in 15 Edw. 3) protested against a number of statutes on the grounds—(1) That they did not assent to the making, or to the form of the statutes; (2) That they could not observe the statutes if contrary to the laws and usages of the realm which they were sworn to keep. These protests involved the contentions that the law could not be changed by Act of Parliament, or that there could not be an operative Act if the Chancellor, Treasurer, and Judges were opposed to its provisions, neither of which has now any constitutional validity (d). Drafting by the Judges was contemporaneous with the Statute Rolls

(a) (1795), Leach C. C. 694, 696.

(b) Stubbs, Const. Hist., vol. ii, 571, 575; Anson, 5th ed., vol. i, p. 260.

(c) Y. B. 14 & 15 Edw. 3, Pref. by Pike, p. lxii. The Judges are still summoned in each Parliament to attend on the House of Lords: Anson, 5th ed., vol. i, pp. 57, 60.

(d) *Loc. cit.*, p. lviii; see Ilbert, p. 77.

(1278-1468). It has to some extent a parallel in the modern practice of settling only the general principles of law by statute, and giving judicial or other departments of State authority to make rules for the execution of statutes (e). It led to difficulties and controversies between the Commons and the Crown (f), and occasionally to the omission of a statute actually passed, or the promulgation of a statute which had not received the necessary assent, and was finally discontinued in the reign of Henry VII. Nor are the productions of the early Judges marked by any special accuracy of language. "In ancient statutes," as Lord Ellenborough observed in *Wilson v. Knubley* (g), as to 4 Edw. 3, c. 7, "no great precision of language prevailed, and the words were very loose and general."

In the reign of Henry VI the practice began of sending the demands of the two Houses to the King in the form of a Bill for his acceptance or rejection. In other words, the Houses of Parliament took away from the Crown and the judiciary the power of settling the form of a statute (h). In 1433 the words "by authority of Parliament" were added to the words of enactment, and from 1 Hen. 7 all reference in the statutes to petition is dropped, the method of legislation by Bill being then fully established (i).

(2) *By conveyancers.* In the reign of Richard III the sessional publication of printed statutes began, and from 1487 the statute roll was no longer made up in the old form. English superseded Latin and French, and Parliament appears to have handed over the drafting of statutes to conveyancers, who were encouraged to prolixity by the invention of printing, and diluted their native language by that cautious use of synonyms (k) which is the common characteristic of deeds and statutes. From this time a verbose style (l) was introduced, not only into the drafting of statutes, but also in deeds of conveyance and other legal documents, which continued in full use as late as 1861, so that "the true objection to modern statutes is rather their prolixity than their want of perspicuity" (m).

Judicial criticism of statutory language.

3. The phraseology of Acts of Parliament has been subjected to much adverse judicial criticism, many Judges having, like Lord Campbell, a keen sense of "the vast superiority of Judge-made law

(e) For a list of the very numerous statutes giving such power, and of the subordinate legislation effected under such statutes, see Index of Statutory Rules and Orders in Force.

(f) See 1 Clifford 326.

(g) (1806), 7 East 128, 136.

(h) Stubbs, Const. Hist., vol. ii, p. 588; Anson, 5th ed. vol. i, p. 262.

(i) Stubbs, vol. ii, 590; see the Act 11 Hen. 6; 1 Rev. Stat. (2nd edit.) 219.

(k) This may have been originally due to uncertainty as to which of several English words accurately rendered a Latin or Norman French law term.

(l) "A remarkable circumstance of the statutes of Henry VIII is the prodigious length to which they ran": Reeves' History of English Law, by Finlason, vol. iii, p. 426.

(m) Barrington, Observations on Statutes (3rd edit.) 175.

over the crude enactments of the Legislature," and a disposition for what has been described as "drawing the fang teeth of an Act of Parliament." Sir Alexander Cockburn, in a speech at the Guildhall, March 9, 1876, described Acts of Parliament as being "more or less unintelligible, by reason of the uncouth, barbarous phraseology in which they are framed"; and he attributed this to the fact that "the work of framing them is committed to few hands, while the task is a Herculean one, far beyond the strength of the men employed properly to discharge." Particular statutes, such as the Franchise Acts (*n*), the Married Women's Property Act, 1882 (*o*), the Divided Parishes, etc., Act, 1876 (*p*), the Bills of Sale Act, 1882 (*q*), the Infants Relief Act, 1874 (*r*), the Regulation of Railways Act, 1893 (*s*), certain parts of the County Courts Act, 1888 (*t*), the Moneylenders Act, 1900 (*u*), and more recently, the Rent Acts (*x*), have brought judicial execration on the conjoint efforts of the draftsman and the Legislature. In *Thomas v. Kelly* (*y*), Lord Macnaghten said: "To say that the Bills of Sale Act (1878) Amendment Act, 1882, is well drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced, and is producing every day." In speaking of one of the private Acts of the New River Co. (*z*) Lord Herschell said (*a*): "If the object had been to render it as difficult of construction as possible, success could hardly have been more complete." And in *Earl Cowley v. Inland Revenue Commissioners* (*b*), Lord Macnaghten, speaking of the Finance Act, 1894, said that some of the provisions "are strangely expressed and singularly ill-drawn." And Jessel, M.R., said with regard to the Metropolitan Street Improvement Act, 1877, "I must say that whoever is responsible for the drafting of clauses 32 and 33 of this Act of Parliament has taken a great deal of trouble to raise a very

(*n*) *Bradley v. Baylis* (1881), 8 Q. B. D. 195, 210, 235, Brett, L.J.; *Knill v. Towse* (1890), 24 Q. B. D. 186, 195, Mathew, J.

(*o*) *Re Armstrong, ex p. Boyd* (1888), 21 Q. B. D. 264, 268, Esher, M.R.; see 4 L. Q. R. 234; 6 *ib.* 313.

(*p*) 6 L. Q. R. 118.

(*q*) *Ex p. Yarrow* (1889), 59 L. J. Q. B. 18, 20, 21, Cave, J.; see 4 L. Q. R. 370.

(*r*) *Duncan v. Dixon* (1890), 44 Ch. D. 211, 215; Pollock on Contracts (13th edit.) 53.

(*s*) Jessel, M.R., in *G. W. Ry. v. Waterford and Limerick Ry.* (1881), 17 Ch. D. 493, 497.

(*t*) *Bazett v. Morgan* (1889), 24 Q. B. D. 48, 51, Field, J.; *Curtis v. Stovin* (1889), 22 Q. B. D. 513, 518, Fry, L.J.

(*u*) Farwell, L.J., in *Sadler v. Whiteman*, [1910] 1 K. B. 868, 886.

(*x*) See per Mackinnon, L.J., in *Sharpe v. Nicholls*, [1945] K. B. 382, 384, ("obscure and complicated provisions") and *Vaughan v. Shaw*, [1945] K. B. 400, 401 ("welter of chaotic verbiage . . . obscure mass of words"). Lord Porter in *Langford Property Co. v. Batten*, [1950] 2 A. E. R. 1079, 1080 ("difficult and elusive wording").

(*y*) (1888), 13 App. Cas. 506, 517.

(*z*) 15 & 16 Vict. c. clx.

(*a*) In *Cooke, Sons & Co. v. New River Co.* (1889), 14 App. Cas. 698, 699.

(*b*) [1899] A. C. 198, 211.

difficult question, when he might with the greatest ease by using appropriate and well-known terms have avoided any question whatever." (c).

In 1877, in his Digest of the Criminal Law (d), Sir James Stephen complained of the phraseology of statutes: "The style of the [Criminal Law Consolidation] Acts is no less unfavourable to those who might wish to derive information from them than their length and their arrangement. Acts of Parliament are formed upon the model of deeds, and both deeds and statutes were originally drawn up under the impression that it was necessary that the whole should form one sentence. It is only by virtue of the provision contained in 13 & 14 Vict. c. 21, s. 2 (e), that a full stop can be introduced into an Act of Parliament at all (f). The effect of this rule of style has been to cause the sections of an Act of Parliament to consist of single sentences of enormous length, drawn up, not with a view to communicating information easily to the reader, but to preventing a person bent upon doing so from wilfully misunderstanding them. The consequence is, that sections of Acts of Parliament frequently form sentences of thirty, forty, or fifty lines in length. And the length of these sentences is only one of the objections to them; they are as ill-arranged as they are lengthy" (g).

"The criminal law exhibits, in perhaps a somewhat exaggerated form, all the characteristic defects of the English statute law, because of the very great number and dispersion of the enactments constituting crimes, the almost total absence of definitions explaining the scope of the enactments, and to some extent specimens of all the vices of drafting that have been known from the beginning of English history" (h).

In speaking of sections 14, 15 of the Offences against the Person Act, 1861, Stephen, J., said in *R. v. Brown* (i): "I cannot help myself thinking that a very much simpler enactment would have suited every purpose, and would have dispensed with these very intricate sections" (k). Many inconsistencies in the drafting of Acts of

(c) *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 161. Cf. *Metropolitan Water Board v. L. B. & S. C. Ry.*, [1910] 2 K. B. 890, 895, Cozens-Hardy, M.R.

(d) Introduction, p. xix.

(e) Enacting that Acts are to be divided into separate sections; repealed by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, *post*, Appendix B), and not re-enacted in the same terms.

(f) In *Barrow v. Wadkin* (1857), 24 Beav. 327, 330, Romilly, M.R., pointed out that "in the rolls of Parliament the words are never punctuated." But in the vellum prints substituted for the old Parliament Rolls it is common, if not now invariable, to insert stops.

(g) As to the length of statutes, Lord Coleridge in *R. v. Whitfield* (1885), 15 Q. B. D. 122, at p. 132 quoted "*brevis esse laboro, obscurus fio*" from Horace.

(h) Mr. R. S. Wright (Parl. Pap. 1875, C. 208, p. 91). See his Reports on Criminal Law (Parl. Pap. 1878, H. L. No. 178); and Thring, Practical Legislation, p. 9.

(i) (1882), 10 Q. B. D. 381, at p. 387.

(k) This was the view of the draftsman, Mr. Greaves, who makes it clear, in his introduction to the Acts of 1861, that their form was due, not to his own inclination, but to Parliamentary exigencies.

Parliament may doubtless be ascribed to amendments introduced during the passage of the Bill through the two Houses (*l*).

On section 33 of the Interpretation Act, 1889, Humphreys, J., said, "That section may be said to state, in the language clear to those persons who prepare and are responsible for the language of statutes, what the common law says in very much shorter and simpler language" (*m*).

Very recently Lord du Parc in the House of Lords when referring to the Betting and Lotteries Act, 1934, said, "[I] suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice which obscures, if it does not conceal, the intention which Parliament has or must be presumed to have, might not safely be abandoned" (*n*).

And in *Donovan v. Cammell Laird & Co.* (*o*) where Devlin, J., held that it was impossible to apply the proviso to regulation 10 of the Shipping Regulations, 1931, to the circumstances of that case "which were not envisaged by the draftsman, *i.e.*, where more than one ship is being repaired in dry dock at the same time or that shipowners never contract with more than one person at a time . . . a simple alternative and one which I hope will commend itself to the Secretary of State if he thinks it important in the public interest to regulate work in dry docks is that he should employ somebody with some knowledge of the conditions under which that work is done to draft a more comprehensible section."

To all these strictures it may be answered, with Lord Macnaghten, "We are not living in Utopia, where a perfect or ideal language may be had very readily" (*p*), and some Judges, who have had experience of the difficulty of drafting and passing Acts, have been less severely critical than their brethren. "I am sure," said Lord St. Leonards in *O'Flaherty v. M'Dowell* (*q*), "we ought to make great allowance for the framers of Acts of Parliament in these days; nothing is so easy as to pull them to pieces, nothing is so difficult as to construct them properly, as the law now stands." And Jessel, M.R., said in *Att.-Gen. v. Great Western Ry.* (*r*), "I am not one of those Judges who carp at the language of the Legislature and say that the draftsman might have put it differently." In construing a portion of the Public Health Act, 1875, Stephen, J., said: "It would be unreasonable to suppose that every section of this long Act, of 343 sections and many schedules, could at the time when it was passed be criticised with all the care which conveyancers might use in a complicated deed. I do not join the censure on the mode in which Acts of Parliament are drawn. Considering their number and length, the defects in them seem to me

(*l*) See *Sadler v. Whiteman*, [1910] 1 K.B. 868, 880, Fletcher Moulton, L.J.

(*m*) *R. v. Thomas* (1949), 65 T. L. R. 586, 587.

(*n*) *Cutler v. Wandsworth Stadium*, [1949] A. C. 398, 410.

(*o*) [1949] 2 A. E. R. 82, 86, 89.

(*p*) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 532, 576.

(*q*) (1857), 6 H. L. C. 142, 179.

(*r*) (1877), 4 Ch. D. 735, 738.

to be few. But there are occasions on which anyone may doubt whether the attention of the Legislature was directed to the words of a particular clause, and to the question whether they were likely to carry out the intention of the Legislature " (s).

In *Re Castioni* (t), in discussing the meaning of crime of a political character in section 3 of the Extradition Act, 1870, Stephen, J., said: "I think that my late friend Mr. Mill made a mistake upon the subject (u), probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it."

The truth seems to lie in the view of an eminent authority, Sir Erskine May: "No one can doubt that with the multifarious legislation which takes place numerous errors are detected. So far as the Judges are concerned, there can be no doubt that when a Judge says an Act of Parliament is obscure the obscurity is unquestionable; but we must bear in mind that the only statutes which are brought before the Judges for adjudication are the difficult statutes which involve points of obscurity and uncertainty; and I cannot help thinking myself, from reading some of their observations, that the Judges look at Acts of Parliament in rather a different spirit from that which characterised the observations of Judges in former times. I think they show less reverence to the traditional 'wisdom of Parliament' than was formerly the case with the old authorities" (x).

Denning, L.J., said in *Seaford Court Estates Ltd. v. Asher* (y), "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the Judges trouble if Acts of

(s) *Vinter v. Hind* (1882), 10 Q. B. D. 63, at p. 68. See also *Winyard v. Toogood* 1882, 10 Q. B. D. 230, and *Tearle v. Edols* (1888), 13 App. Cas. 183, 185.

(t) [1891] 1 Q. B. 149, 167.

(u) See Clarke on Extradition (3rd edit.), Appendix, p. cclx.

(x) Sir Erskine May, *Parl. Rep.* 1875 (C. 208), p. 4; Thring, "Simplification of the Law," *Quart. Rev.* Jan. 1874.

(y) [1949] 2 K. B. 481 at p. 498; see also *Norman v. Norman*, [1950] 1 A. E. R. 1082, 1084.

Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this, not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the Legislature. That was clearly laid down by the Resolution of the Judges in *Heydon's Case* which is set out by Lord Coke in the third volume of his Reports (pt. 3, 7b) and it is the safest guide today. Good practical advice on the subject was given at about the same time by Plowden in his second volume (p. 467). Put into homely metaphor it is this: A Judge should ask himself the question: if the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A Judge must not alter the material of which it is woven, but he can and should iron out the creases."

Remedies for defective drafting.

4. In *River Wear Commissioners v. Adamson* (z), Lord O'Hagan suggested, as a remedy for the failings of the statute law, the institution of "a department by which Bills, after they have passed committee, might be supervised and put into intelligible and working order, and then submitted for final revision to Parliament before they passed into laws." But it is most unlikely that the Legislature will admit its own incompetence, and delegate to any outside person one of its most important functions. Nevertheless, considerable efforts have been made to remove the defects which have evoked these various criticisms, and to simplify the language and improve the structure of Acts of Parliament, and the labours of the eminent men who had to draft the Indian Codes have reacted upon the aims and methods of English legislation.

Sir James Stephen, in the Preface already referred to, Lord Thring (a) and Sir Courtenay Ilbert (b) are the only persons who have written anything to guide the draftsman of British statutes; but perusal of the evidence taken before, and the reports of, parliamentary committees, will indicate the causes, and consequently suggest the remedies, of most of these defects.

In 1856, the Statute Law Commissioners recommended the appointment of an officer or board to revise Bills in their passage through Parliament, somewhat in the same way as Judges then dealt with Estate Bills. In consequence of this report an inquiry was held by

(z) (1877), 2 App. Cas. 743, 756.

(a) Practical Legislation (edit. 1902), in which are laid down general rules for drafting statutes. See p. 29 *post*.

(b) Legislative Methods and Forms, 1901.

a Select Committee of the House of Commons, but it came to nothing, owing to the dissolution in that year.

In 1868 the Statute Law Committee was appointed (c) the immediate practical outcome of whose work was the issue of the Revised Statutes in 1886.

Since 1869 all Government Bills not relating solely to Scotland and Ireland have been subjected to revision by the Parliamentary Counsel to the Treasury (d). Purely Scottish Bills are drawn in the Scottish Office, under the supervision of the Lord Advocate; and purely Irish Bills were drawn in the Irish Office, under the Irish law officers, and the source of the Bills is clearly traceable in the difference of style and method.

A Select Committee was appointed on March 4, 1875, to consider "whether any and what means might be adopted to improve the manner and language of current legislation." It presented a report (e) to which reference will presently be made, but a motion (f) that effect should be given to its recommendations was opposed by the Government and defeated. They have, therefore, remained counsels of perfection only, but have considerably influenced the method of drafting public Bills, and are of sufficient importance to merit a *résumé* in this chapter.

Defects in modern Acts.

5. The leading objections, not merely captious, to the style and structure of modern public Acts arise (g):—

- (1) From the mode in which Bills are prepared and the extent to which they vary, or deal with, previous statutes;
- (2) From the uncertainty which is often caused by inconsistent and ill-considered amendments;
- (3) From want of consolidation where groups of statutes on similar subjects are left in a state of perplexity (h); and
- (4) From the absence of a proper classification of the public Acts of Parliament.

Of these, the second depends on inherent difficulties of legislation, and on the political or legal capacity of the Member of Parliament who has the conduct of the Bill.

The amendments made in the Judicature Act, 1873, during its passage through Parliament caused a serious error with respect to the number of the Judges and to the status of the Chancellor in the High Court, which was corrected by the Act of 1875.

As to (4) above the question of classification is dealt with later at pp. 52 *et seq.* But the first and third defects depend to a considerable extent on the draftsman.

(c) Preface to vol. i of Revised Statutes (1st edit.), p. v. See p. 29 *post*.

(d) Parl. Pap. 1875 (C. 208), p. 9 (Sir Erskine May).

(e) June 25, 1875 (C. 208).

(f) March 24, 1876.

(g) Parl. Pap. 1875 (C. 208), p. v. (h) *L. c.*, p. v, and *infra* pp. 26—28.

The evils arising from imperfections in drafting fall into three classes, according to their origin, viz.:—

Accidental slips (*i*)

Ignorance of the draftsman (*k*); and

More or less intentional obscurities, perplexities, or imperfections, inserted or permitted with a view to facilitate the passage of the Bill through Parliament.

Accidental slips. Accidental slips have been numerous, and are dealt with in more detail in the chapter on “ Mistakes,” *infra*, Part II, chap. x.

Ignorance. Ignorance is probably oftener displayed in private members’ Bills than in those originating in Government departments. “ It is, however, a very serious matter to hold, that where the main object of a statute is clear, it shall be reduced to a nullity by the draftsman’s unskilfulness or ignorance of law. It may be necessary for a Court of justice to come to that conclusion, but their Lordships hold that nothing can justify it except necessity, or the absolute intractability of the language used ” (*l*).

Legislation by reference. Legislation by reference consists in reference to parts of several Acts, some of which are repealed, some amended, and others kept alive subject to the provisions of the amending Act (*m*).

This practice is usually the outcome, not of negligence, ignorance, or incapacity in the draftsman, but of the foibles of Parliament, and is excused on the ground that it lessens political difficulties and simplifies the process of getting Bills through committee by lessening the area for amendment (*n*). The same excuse is made for the practice of putting very long clauses, elaborately divided into many sub-divisions, in what are called fighting Bills (*o*).

Legislation by reference, which was increasing in 1875, and has since that date still further developed, was described by the committee as making an Act so ambiguous, so obscure (*p*), and so difficult that the Judges themselves can hardly assign a meaning to it, and the ordinary citizen cannot understand it without legal advice. With this parliamentary criticism judicial opinion coincides. In *Knill v. Towse* (*q*) the question for decision was, whether upon the construction of section 75 of the Local Government Act, 1888, and the enactments incorporated therein by reference, a county elector could vote in more than one electoral division of the same county. In deciding that he

(*i*) Parl. Pap. 1875 (C. 208), p. v.

(*k*) *Salmon v. Duncombe* (1886), 11 App. Cas. 627. Cf. *R. v. Vasey*, [1905] 2 K. B. 748.

(*l*) *Salmon v. Duncombe*, *supra*, at p. 634.

(*m*) Instances may easily be found in the annual Finance Acts.

(*n*) Thring, p. 55.

(*o*) *E.g.*, the Local Government Act, 1888 (51 & 52 Vict. c. 41).

(*p*) Parl. Rep. 1875 (C. 208), p. iv; and see Thring, pp. 8, 53, 57.

(*q*) (1889), 24 Q. B. D. 186 and 697 (C. A.)

could not, the Court (Lord Coleridge, C.J., and Mathew, J.) said (r): "We have arrived at this conclusion with some difficulty, though without doubt. The difficulty has arisen, not from anything inherent in the subject itself, which is simple enough, and might be quite simply treated, but from the mode of legislation now usual in these matters. Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses, are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statutes with which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only, or absolutely contradict, the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour, generally speaking, wholly unnecessary."

Legislation by reference is also a source of much administrative inconvenience, as will appear from the following illustrations:—

By section 34 of the Elementary Education Act, 1876, "all enactments relating to guardians and their officers and expenses and to relief given by guardians shall, subject to the provisions of this Act, apply as if the guardians, including the school attendance committee, were acting under the Acts relating to the relief of the poor, and the Local Government Board may make rules, orders, and regulations accordingly." Of this section, Field, J., said in *R. v. Eaton* (s): "It is impossible to exaggerate the inconvenience of this mode of legislation. Instead of the Legislature referring specially to any previous Acts or sections of Acts which it proposes to incorporate in this section, the only incorporation is that of 'all enactments relating to guardians' rendering it necessary, therefore, for any tribunal required to construe the Act to search through every Act of Parliament in which guardians are referred to, to see whether any particular enactment can be found bearing upon the matter in hand; and inasmuch as there is in this very Act a set of clauses expressly referring to legal proceedings, I am not at all surprised that the parties in the present case, finding no extension of the jurisdiction in those clauses, conceived that it had not been given to them." An extreme instance of the degree to which legislation by reference may be carried is to be found in the provisions of the London Government Act, 1899, as to compensation to existing officers for abolition of office. "Section 30 (2) brings in section 81 (7) of the Local Government Act, 1894, which in turn brings in section 120 of the Local Government Act, 1888. The

(r) *L. c.*, p. 195.

(s) (1881), 8 Q. B. D. 158, 160.

concluding words of section 120 (1) of the Act of 1888 bring in section 7 of the Superannuation Act, 1859, which in turn sends the reader back to section 2 of the Superannuation Act of 1859" (t). So in *Miller v. Boothman* (u), a case under section 14 (1) of the Factories Act, 1937, complications arose through references to regulations made under the Act of 1937, and those made under the repealed Act of 1901, which were kept alive by the Act of 1937.

When legislation by reference is justifiable or excusable. Legislation by reference may be justifiable where a code exists with properly classified titles, but is unsuited to an undigested statute-book. Its inconvenience is, that it does not make plain to the citizen what may be clear enough to the draftsman who has all the threads of the subject in his hands. But with the rapid progress of consolidation it may be soon possible without causing obscurity (x). And there are even now certain cases in which it is beneficial, and saves useless repetition without causing any difficulty of interpretation. Thus, the description of an offence created by statute as treason, felony or misdemeanour has long been held to attract the common law incidents attaching to those crimes (y). And now that summary punishment for minor offences is allowable under many statutes, it is usual and unobjectionable to insert "on conviction in manner provided by the Summary Jurisdiction Acts" (as defined by section 13 of the Interpretation Act, 1889) as indicating succinctly the procedure to be adopted with relation to the offence.

Another mode of legislation by reference, too well established for criticism, is that adopted in the Clauses Acts of 1845 and 1847, whereby a large body of clauses is incorporated into subsequent Acts without repetition (z). This method attaches certain statutory incidents to certain classes of corporations subject to modification by special Acts, and is analogous to the method by which the Law of Property Act, 1925, imports by implication into deeds certain common form clauses. The advantages of this method may be easily overrated, for in every case the special Act to which one of the Clauses Acts applies must be examined to see if any modifications have been effected, and very difficult questions often arise as to the effect of subsequent public legislation upon so complicated a system of combined general and special Acts (a).

(t) *Livingstone v. Mayor, etc. of Westminster*, [1904] 2 K. B. 109, 117, Buckley, J. For a striking instance of the difficulties and obscurity arising from this mode of legislation, see *Willingale v. Norris*, [1909] 1 K. B. 57, 61, on the Hackney Carriage Acts; *Phillips v. Parnaby*, [1934] 2 K. B. 299.

(u) [1944] K. B. 337, see *post*, p. 282.

(x) See also *post*, Part II, chap. v, "Consolidation Acts"; see also Parl. Pap. 1875 (C. 208), p. 7, Sir E. May; "Simplification of the Law," by Sir H. Thring, *Quart. Rev.* Jan. 1874; Thring, 54; Ilbert 111—121.

(y) Interpretation Act, 1889, s. 33, *post*, Appendix B.

(z) Parl. Pap. 1875 (C. 208), p. 4.

(a) *E.g.*, of the effect of (the railway ticket section) s. 5, of the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), upon ss. 104, 105 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and on the innumerable special railway

Aids to the draftsman.

6. The labours of the draftsman have been lightened and his excuses in proportion diminished, by the efforts of the Statute Law Revision Committee, which have resulted in the following improvements in, and aids to the understanding of, the statute law:—

- (1) Expurgation of defunct statutes;
- (2) Issue of the revised editions, showing the effect of the expurgation;
- (3) Preparation of chronological tables of statutes showing the repeals and amendments effected up to the date of the revision;
- (4) The chronological table and alphabetical index to the statutes in force (*b*), now re-edited annually; and
- (5) The table, inserted at the end of each sessional publication of the statutes, showing the express repeals effected by the legislation of each year, in such a form as to enable the practitioner without much labour to bring up to date his copy of statutes.

In addition to Lord Thring's work, already referred to (*c*), and his article on the simplification of the law (*d*), and Sir Courtenay Ilbert's book on "Legislative Methods and Forms" (*e*), there are for the guidance of the unofficial draftsmen Sir Alison Russell's *Legislative Drafting and Forms* (4th ed., 1938) and Piesse and Gilchrist Smith's *Elements of Drafting* (1950).

Acts passed since 1845: *Huffam v. North Staffordshire Ry.*, [1894] 2 Q. B. 821, (railway bylaw invalid).

The latest change has arisen, as Bowen, L.J., pointed out in *Ex p. Pratt* (1884), 12 Q. B. D. 334, 340, from "framing Acts on the idea that a code [on some particular subject] is being constructed, and [then] when the present tense is used, it is used, not in relation to time, but as the present tense of logic." This practice is based on the rule of draftsmen that an Act should be treated as always speaking: Ilbert 248.

(*b*) See Ilbert, 33, 65, 66.

(*c*) Practical Legislation (edit. 1902).

(*d*) Quarterly Review, Jan. 1874.

(*e*) Oxford, 1901.

CHAPTER III

AUTHENTICATION AND CITATION

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Promulgation.

1. *English Acts.* Formal promulgation is not necessary to make an Act of Parliament binding within the United Kingdom (a), and many Acts come into force on the date when they receive the royal assent, and some time before an official print is obtainable. But the earlier English statutes were proclaimed by the sheriffs in the county courts (b), and exemplifications under the Great Seal were prepared and sent to them for this purpose. Some Acts still in the Statute-book are not found in the records of Parliament, and have been printed from these exemplifications (c).

It was also the practice to provide transcripts for the use of the Courts at Westminster and the justices of assize (d). The *Ordinacio de Conspiratoribus* (33 Edw. 1) concludes : *et ordinatum est quod Justiciarii assignati ad diversas transgressionibus et felonias in singulis*

(a) Some Imperial Acts have to be proclaimed in a British possession before coming in force there; e.g., the Foreign Enlistment Act, 1870. See *R. v. Jameson*, [1896] 2 Q. B. 425. Acts extending to the Channel Islands are registered in the Courts of the islands. A law in the Isle of Man, passed by the Council and House of Keys and assented to by the King in Council does not become law in the island till promulgated at a Tynwald Court held annually on 5th July on a particular bill (Jenkyns; *British Rule and Jurisdiction beyond Seas*, 39). *Vide post*, Part II, chap. viii.

(b) *R. v. Sutton* (1816), 4 M. & S. 532, 542, Ellenborough, C.J.

(c) E.g., Stat. de Pistoribus, 1 Rev. Stat. (2nd edit.), p. 76; 7 Edw. 2, forbidding wearing of armour, 1 Rev. Stat. (2nd edit.), p. 63.

(d) E.g., 10, 11, 14, 18, and 20 Hen. 6, 1 Rev. Stat. (2nd edit.), pp. 217—225.

comitatibus Angliae audiendas et terminandas habeant inde transcriptum (e).

Precepts were sent to the sheriffs requiring them to read and proclaim the statutes sent therewith under seal in the full county court (*f*), and in each hundred, borough, market-town, etc., and to make transcripts and deliver them to trusty knights of the county, and to every justice of the peace when that office was instituted (*g*).

The earliest modes of promulgation are exemplified in the case of a statute against the Jews passed in 1271, and preserved only in the *Gesta Abbatum Sti. Albani*. That chronicle (vol. i. 402) contains:

- (1) A letter from Walter, Archbishop of York, then Primate, to the Chief Justice, requesting the full enrolment (*inrotulari integre et complete*) and speedy publication of the Act, of which the Archbishop gives an abridgment; and
- (2) Letters patent of the King setting out the Act, and commanding its public proclamation and observance *per totam balliviam vestram* (i.e., the liberty of St. Albans).

Scottish Acts. Similar provisions were made in Scotland. By an Act of 1425 the Clerk Register was directed to register the statutes, and to give them to the sheriffs for proclamation, and to give copies to anyone who asked and would pay for them.

Till 1581 it seems to have been generally believed in Scotland that a statute did not bind the lieges in any shire until proclaimed at the market-cross of the chief town in the shire. In that year it was enacted that publication and proclamation should be made only at the market-cross of Edinburgh, which should be equivalent to publication in every shire, and that all subjects should be bound by the laws forty days after such publication (*h*).

Irish Acts. In many of the Acts of the Irish Parliament provision was made for their proclamation, and that no penalty should be incurred until they had been duly proclaimed (*i*).

British Acts. Statutes of the United Kingdom are promulgated, not by proclamation, but by being printed and circulated among the persons named on what is called the Promulgation List (*k*).

Channel Islands. Those affecting the Channel Islands are promulgated by registration in the Royal Courts of the islands (*l*), and in modern Acts it is not uncommon to insert a provision requiring

(*e*) Some statutes have been preserved only through transcripts in the Red Books of the Exchequer in Westminster and Dublin.

(*f*) Cf. the provisions of s. 7 of the Riot Act (1 Geo. 1, stat. 2, c. 5) requiring that it be openly read at every quarter session and at every leet or law day.

(*g*) 1 Statt. Realm, Intr. p. lxxxvii; *R. v. Sutton* (1816), 4 M. & S. 532.

(*h*) 1 Statt. Realm, Intr. pp. lxxix, lxxxviii; Bell, Dict. Law Scott., tit. Statute. Cf. 2 Hen. 5, stat. 1, c. 8.

(*i*) English Acts intended to bind Ireland were exemplified and sent over for proclamation.

(*k*) See p. 32 *post*.

(*l*) See *Re States of Jersey* (1853), 9 Moore P. C. 185; Anson, vol. ii, part ii., p. 57.

such registration (*m*), but neither the insertion of the clause nor the registration of the Act appear to be conditions precedent to its taking effect in the islands if it is aptly worded (*n*).

Colonies. In British colonies acquired from the French some proof of registration of French legislative Acts in the colony is required to justify their acceptance as part of the colonial law (*o*).

The British statutes are circulated in the colonies through the Colonial Office, to which the necessary copies are annually supplied, and the Governments of the chief colonies annually reprint, as an annex to the sessional publication of the colonial statutes, such of the imperial statutes of the year as extend to the colony (*p*).

* *Sessional publication.* The printed promulgation of the statutes in the form of sessional publications began in 1484 in England (*q*) and in 1540 in Scotland, but in Ireland not until the reign of Charles I.

In 1801, by resolution of the House of Commons, the King's printer was authorised and directed to deliver a certain number of copies of each public general statute in accordance with a list appended to the resolution.

This list (*r*) was not based on any definite principle, but continued until 1881 as the basis of the distribution of statutes, with additions made by successive Secretaries of State, also sanctioned without any guiding principle and without revision by any proper authority, or any provision for responsibility for ensuring the delivery of the statutes at their proper destinations.

In 1835 a Committee of the House of Commons considered and reported (*s*) on the regulations for the issue of printed papers, but no action seems to have been taken on the Report.

In 1881 a departmental committee was appointed for the revision of the promulgation list, on the recommendation of the Select Committee appointed by both Houses to consider the First Report of the Stationery Office.

The reformed distribution of the statutes is, however, in the nature, not of a promulgation *urbi et orbi*, but of a supply for administrative and judicial purposes to officials of the Government and of counties and boroughs. And there seems to be no right of public access to any of the statutes so distributed, except where they are in the British Museum or other public libraries. Those who have to administer the law are informed of the Acts of the Legislature, whilst those who

(*m*) See 54 & 55 Vict. c. 21, s. 17 (Savings Banks); 8 Edw. 7, c. 48, s. 88 (Post Office).

(*n*) Dicey, Constitution, 9th edit. 53 n.; Jenkyns, British Rule and Jurisdiction Beyond Seas, 37—39.

(*o*) *Du Boulay v. Du Boulay* (1869), L. R. 2 P. C. 430.

(*p*) The rules as to the proof of subordinate legislation (statutory rules and bylaws) are dealt with, Part II, chap. iii, *post*.

(*q*) 1 Statt. Realm, Intr., p. lvi.

(*r*) Annexed to the Report of the Committee appointed in 1881 to consider and revise it: Parl. Pap. (1883, C. 3648), p. 27.

(*s*) Parl. Pap. 1835.

have to obey it have to find out its terms by experience and the daily papers.

The statutes revised. A revised edition of the statutes up to 1878 was completed in 1885, in eighteen volumes quarto (t), uniform in size with the quarto edition of the statutes. In 1886 Mr. Howell, M.P., induced the Government to sanction the publication of a second revised edition of the statutes in a cheap form, in order that it might be easily purchasable for the libraries accessible to the working classes, and the edition was in 1909 brought down to the year 1900. This edition is in twenty octavo volumes, and is uniform with the annual publication of the statutes in octavo, which began in 1884 (u). A further four volumes were published in 1928-9 covering the statutes from 1901 to 1920 inclusive. A completely new edition of the statutes revised was published in 1950. It covers the statutes down to the year 1948. "There are indeed two classes of persons whose needs the revised edition will not meet, and, it may be added, was not specially designed to meet: the Judge who has to decide, the counsel who has to advise on the construction of an obscure enactment, frequently find it necessary to refer to the language of Acts, sections, or words which have been repealed either as dead law by Statute Law Revision Acts or as superseded law by amending or consolidating Acts. To the historical student the law of the past is even more important than the law of the present. Both these classes of persons require an edition of the statutes containing everything that has been repealed either by way of statute law revision, or otherwise. But both these classes may derive material assistance from the notes and tables in the revised edition, which show the reason for each repeal or omission" (x).

Authentication.

2. *Public Acts.* Strictly speaking, public statutes need no proof, being "supposed to exist in the memories of all" (y). But this pleasant fiction merely dispenses with formal proof of the existence of the Act, and the necessity of reference to it in pleading. In the term Public Acts are for this purpose included all local and personal Acts which are to be judicially noticed. The enactments making King's printer's copies evidence (z) apply only to private Acts, "not to be judicially noticed," and there is no corresponding provision as to public Acts of the United Kingdom.

The presence of any ancient document vouched as a statute on the

(t) The unrevised statutes up to 1878 were in 118 volumes.

(u) The official index to the statutes, now published annually, contains a complete chronological table of all statutes printed as public statutes, (vol. i) with a statement of repeals and amendments, and (vol. ii) an index of the subject-matter.

(x) Sir Courtenay Ilbert, *Journ. Soc. Comp. Legislation* (N.S.), vol. ii. (1900), p. 78.

(y) Taylor (12th ed.), §§ 5, 1523.

(z) See p. 35 *post*.

Parliament Roll or Statute Roll, or its absence therefrom, is not conclusive for or against its legislative validity (a).

The Judges have to some extent power to inquire whether a statute is what it purports to be—an Act of Parliament (b)—for an Act of Parliament passed by the combined action of its three constituent parts is the only mode in which the will of Parliament can be expressed in a manner binding on the lieges (c).

With irregularities or departures from the usage of Parliament the Courts have nothing to do. They cannot review or correct, or in any way deal with them. But though a departure from the usage of Parliament during the progress of a Bill will not vitiate a statute, informalities in the final agreement of both Houses have been treated as if they would affect its validity. No decision of a Court of law upon the question has ever been obtained, but doubts have arisen there (d) and in two cases Parliament has thought it advisable to correct by law irregularities of this description (e).

In May's Parliamentary Practice (13th ed. p. 441), three questions which might arise were suggested :—

- (1) Will the royal assent cure all prior irregularities in the same way as the passing of a Bill in the Lords would preclude inquiry as to informalities in any previous stage ?
- (2) Is the indorsement on the Bill recording the assent of King, Lords, and Commons (f) conclusive evidence of the fact ? or
- (3) May the Journals of either House be permitted to contradict it ? (g).

It is submitted that the Courts, in an ordinary case, would regard the existence of an enrolled copy among the records of Parliament

(a) See *The Prince's Case* (1605), 8 Co. Rep. 20 b; 4 Ruffhead, Statutes, p. xiii.

(b) 8 Co. Rep. 18 a.

(c) Dicey, Constitution 4th ed. 39. But since August 18, 1911, a Bill may, in accordance with the provisions of the Parliament Act, 1911, become an Act of Parliament by being passed by the House of Commons and receiving the royal assent without having been consented to by the House of Lords. When a Bill receives the royal assent under s. 2 of the Parliament Act, 1911, without the consent of the House of Lords, a certificate of the Speaker of the House of Commons, signed by him, that the provisions of that section have been complied with is conclusive for all purposes and cannot be questioned in a Court of law. The Welsh Church Act, 1914, was passed under this Act. The Government of Ireland Act, 1914, also received the royal assent under this Act, and appears by the enacting clause to have been "enacted by the King's Most Excellent Majesty by and with the advice and consent of the Commons in this present Parliament assembled in accordance with the provisions of the Parliament Act, 1911." Cf. Parliament Act, 1949 (12, 13, & 14 Geo. 6, c. 103), which further restricts the delaying powers of the House of Lords.

(d) *Pylkington's Case* (1450), Y. B. 33 Hen. 6; and see *College of Physicians v. Cooper* (1675), 3 Keb. 587, Hale, C.J.; and *The Prince's Case* (1605), 8 Co. Rep. 18 a.

(e) The Elementary Education Act, 1891, and the Companies Act, 1907, cf. note (n) p. 44, *post*.

(f) Or of the King and Commons in accordance with the provisions of the Parliament Act, 1911 (1 & 2 Geo. 5, c. 13, s. 2). See note (c), *supra*.

(g) These questions have apparently been omitted from later editions.

(or Chancery), purporting to be duly assented to, as conclusive out of Parliament, and would decline to enter upon any inquiry into the contents of the Journals or into the usages or resolutions of either House, except so far as they purport to alter the common or statute law (*h*).

Once satisfied of the authenticity of an Act, the Judges would be bound to take judicial notice of its contents, and as it is not permissible to refer to debates in Parliament in explanation of the meaning of an Act, so also it would seem no part of the judicial office to scrutinise the contents of the Journals of either House or the drafts of Bills to see whether the Act in question had properly received the assent of the Legislature.

If a serious question were raised as to the validity of an Act, no doubt the Judges would adjourn the proceeding in which it arose until Parliament had an opportunity of settling the question by a fresh Act, as was done in the case in 1450 referred to in May, Pr. of Parl. (13th edit.), 441 (*i*).

If any reason arises for doubting the accuracy of the print of any statute, reference may be had to the Chancery enrolment as to statutes passed prior to 1849, and also, as to Acts between 1487 and 1849, to the original Acts (*j*). Apparently this is to be done by the Court itself with reference to public general Acts, or any local or private Act directed to be judicially noticed as a public Act (*k*), and it does not seem to be the duty of the parties to examine or to produce an examined copy of the entry on the Chancery Roll or of the vellum print. The records of Parliament are open (for a fee) to all who desire to collate the King's printer's copy with the Parliament Roll or original Act or print on vellum, and it is in accordance with ordinary judicial practice to require the person who disputes the accuracy of an official document to make good his assertion.

Private Acts. Every Act passed after 1850 is a public Act judicially to be noticed as such unless the contrary is expressly provided in the Act (*l*). Private Acts passed before the end of 1850, and Acts since that date specially declared private, if printed and for sale are proved by production of a copy purporting to be printed by the King's printer,

(*h*) *Stockdale v. Hansard* (1837), 3 St. Tr. (N.S.) 723, 850; 9 A. & E. 1. The Court, in *Bradlaugh v. Gossett* (1884), 12 Q. B. D. 271, declined to go behind a resolution of the House of Commons as to its own internal management.

(*i*) *Pylkington's Case* (1455) Y. B. 33 Hen. 6.

(*j*) In 1849 the ancient system of engrossing all Bills upon parchment after the report was discontinued, May, Parl. Pract. (15th edit.) 575: "Two prints are prepared on a durable vellum which, after a further examination in the Public Bill Office are endorsed with the words by which the Royal Assent was signified and signed by the Clerk of the Parliaments and become the official copies of the Act. One of these is sent for custody to the Public Record Office and the other is preserved in the House of Lords. . . . Paper prints of the Act are placed on sale to the public, and printed copies are referred to as evidence in Courts of Law. The original prints may be seen, when necessary, and copies taken on payment of certain fees."

(*k*) *Beaumont v. Mountain* (1834), 10 Bing. 404, 406, Tindal, C.J.

(*l*) Interpretation Act, 1889, s. 9, *post*, Appendix B, re-enacting 13 & 14 Vict. c. 21, s. 7.

or otherwise under His Majesty's authority, or under the superintendence or authority of H.M.'s Stationery Office (*m*).

Private Acts not printed for sale (*n*) are proved by an exemplification (*o*), transcript (*p*), or an examined or certified copy of the original from the Record Office or the Clerk of the Parliaments. The old practice, where a private Act had to be proved, was to obtain a certification of the Act out of Chancery. The fact of its enrolment there justified the assumption that the royal assent had been given. When doubt arose as to the correctness of the enrolment in Chancery, that Court issued a *certiorari* to the Clerk of the Parliaments, who made a return by exemplifying the Act from the records in his custody (*q*).

Until the Judicature Acts the Common Law Courts could not send to the Clerk of the Parliaments (*r*). But at the present time, when any doubt arises on any statute, the High Court requires the attendance of an officer from the Parliament Office with the original Act, engrossed or printed on vellum as the case may be, and the formalities of *certiorari* and return are superseded by collation of the original Act with the King's printer's copy circulated for public use, or, in the case of statutes not printed for circulation, by reference to the original Act, which is now always printed.

Acts prior to the union with Scotland and Ireland. By section 9 of the Crown Debts Act, 1801, Acts of the English and British Parliament are proved in Ireland and Acts of the Irish Parliament are proved in Great Britain by production of a copy printed by the duly authorised printer.

There is no statutory provision for the proof in Scotland of Acts of the English Parliament nor for the proof of Scottish Acts in England or Ireland (*s*).

Colonial statutes. Statutes and ordinances of British possessions abroad are judicially noticed in the possession to which they belong, and elsewhere in the empire are treated as foreign law, but may be proved under section 6 of the Colonial Laws Validity Act, 1865, by

(*m*) Evidence Act, 1845, s. 3; Documentary Evidence Act, 1882, s. 2.

(*n*) Collections of most of these Acts are available in the libraries of the Inns of Court, and the Parliament Roll may be inspected for a fee of 5s. Indices of Private Acts exist: (1727—1812) Bramwell's Analytical Table; (1801—1899) Official Index; and see the Tables at the end of the annual volumes of Public General Statutes. A certain number of Acts published with the Public General Statutes are indexed in the Index to Local and Personal Acts, and are not included in the Index to the Statutes. (See preface to that book (ed. 1945).)

(*o*) A copy made from the Chancery Roll—(1) for the safe custody, proclaiming, or recording of the Act; or (2) for affording authentic evidence of its tenor. It was examined with the record, and certified by the Old Masters in Chancery : 1 Statt. Realm, Intr. p. xxxv.

(*p*) Transcripts by writ were copies sent into Chancery, in answer to the King's writ of *certiorari* or mandate, to the officers who had the custody of the original.

(*q*) *College of Physicians v. Cooper* (1675), 3 Keb. 587, 588, Hale, C.J.

(*r*) See 1 Statt. Realm, Intr. p. lxix.

(*s*) An official revised edition of Scottish Acts still unrepealed was published in 1908.

the certificate of the proper officer of the Legislature of the colony that the document attached thereto is a true copy of the statute or ordinance, or under the Evidence (Colonial Statutes) Act, 1907, by copies purporting to be printed by the Government printer of the possession. The Act of 1865 does not apply to the Channel Islands, the Isle of Man, or British India (section 1) (*t*). The Act of 1907 applies to all British possessions as defined by section 3, and by the Interpretation Act, 1889 (*u*). Power is given to extend its operation to Cyprus and British protectorates.

Assent may be contested. Unlike, e.g., the Australian constitution where the Courts may pronounce on the validity of legislative enactments generally (*x*), the only parts of a public statute which may be traversed or contested to any extent in an English Court of justice are—

- (1) The words of assent, and
- (2) The preamble and recitals.

These alone contain any allegations of fact, the rest of the Act expressing the will of the Legislature.

The consent of King, Lords, and Commons being essential to constitute an Act of Parliament (*y*), any doubt as to the giving of this consent may be investigated by the Courts, and this is the only question as to the validity of the Act which, under our constitution, the Courts may investigate.

The proper mode of determining any doubt of this kind would be by certificate from the Speakers of both Houses of Parliament, or by proof that the impugned statute was duly enrolled in Parliament, or that the original was duly indorsed with the fact and date of the royal assent. But it is practically certain that the Judges in the case of modern Acts would decline to go behind the Parliament Roll or the King's printer's copies of Acts officially supplied, unless they received official intimation from some branch of the Legislature that the necessary consents had not been given (*z*).

The earliest rule on the subject is given by Coke (on Littleton, 98 b) with reference to the statute of *Quia Emptores* (*a*): "Secondly, it is (amongst other Acts of Parliament) entered into the Parliament Roll, and therefore shall be intended to be ordained by the King by the consent of the Lords and Commons in that Parliament assembled. Thirdly, it is a general law whereof the Judges may take knowledge, and therefore it is to be determined by them whether it is a statute or not."

(*t*) As to the present constitution of India; see p. 465 *post*.

(*u*) *Post*, Appendix B.

(*x*) *Commonwealth of Australia v. Bank of New South Wales*, [1950] A. C. 235. (Australian banking legislation.)

(*y*) See *ante*, p. 34; *post*, pp. 50, 51; *The Prince's Case* (1605), 8 Co. Rep. 18; *College of Physicians v. Cooper* (1675), 3 Keb. 587, Hale, C.J. By this rule fell all the ordinances of the Long Parliament.

(*z*) See May, *Parl. Pract.* (14th edit.) pp. 574—793.

(*a*) 18 Edw. 1, c. 1.

Evidence of the royal assent, other than the words of enactment, was never required as to the earlier statutes, public or private (b), and "from the beginning of 3 Edw. 1 to Hen. 6 there is no mention of the royal assent" on public or private Acts other than the words of enactment.

The importance of this question with reference to old Acts lay in the fact that, as the Act was in the form of a petition, unless it was indorsed *le roy le veult* or *soit fait come il est désiré*, the sole evidence of royal assent was the appearance of the Bill on the record.

Since 1793 it is submitted that such evidence may in some cases be necessary, for the commencement of an Act is now regulated by the indorsed date of royal assent, and not by the commencement of the session (c), and that in the absence of such indorsement by the Clerk of the Parliaments no document can be treated as an Act without further inquiry as to the fact and date of assent. But the Judges take judicial knowledge of the order and course of proceedings in Parliament with reference to statutes (d).

Assent is now usually given by Royal Commission, to which are scheduled the Bills assented to, specified by their short titles (e).

Preambles and recitals may be contested. The preamble precedes the words of enactment, and is in the nature of a recital of the facts operative on the mind of the law-giver in proceeding to enact.

The validity or accuracy of its recitals can never come in question (f), nor can it be denied that they induced the Legislature to legislate; but it does not therefore follow that the facts stated are true, nor that they are to be judicially accepted as evidence conclusive against all the world or any individual.

In *R. v. Haughton (Inhabitants)* (g), a recital in a local Act (59 Geo. 3, c. xxii) stating that a particular road was in parish A was admitted as evidence of the fact. On appeal Lord Campbell said: "A mere recital in an Act of Parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the recital." And in *Earl of Carnarvon v. Villebois* (h), in order to prove the existence of certain rights of free warren and free chase against copyholders, an Inclosure Act of 23 Geo. 3 was admitted in evidence which contained a proviso that nothing should prejudice the rights of the lord of the manor to the rights of free warren and free chase, "as being," as Parke, B., put it, "some recognition of the right upon a subject-matter upon which evidence of reputation would be receivable" (i).

(b) *College of Phisitians v. Cooper* (1675), 3 Keb. 587, Hales, C.J. As to the necessity of the consent of the Lords see the Parliament Act, 1911, referred to in note (c), p. 34 *ante*.

(c) 33 Geo. 3, c. 13, p. 48 *post*.

(d) See Roscoe, *Nisi Prius* (20th ed.) 82; Taylor, *Evidence*, s. 84.

(e) As to Short Titles, see p. 47 *post*.

(f) Co. Litt. 19 b. *Labrador Co. v. R.*, [1893] A. C. 104.

(g) (1853), 6 Cox C. C. 101; 1 E. & B. 501, 516.

(h) (1844), 13 M. & W. 313, 332.

(i) See Wilberforce, p. 15.

It has been contended, on the one hand, that recitals in Acts of Parliament are not evidence of facts (*k*), but only of the opinion of the Legislature, or of representations made to it and believed by it. On the other hand, it is urged that recitals of facts contained in a preamble amount to findings with respect to those facts in the High Court of Parliament, and are conclusive upon all inferior Courts and all subjects, being in the nature of *res judicata*. But thus far the Courts have steered a middle course between these two opinions (see p. 40).

In *Headland v. Coster* (*l*), Collins, M.R., referred to a recital in the Distress for Rates Act, 1849: "That recital is certainly not altogether true. . . . In that limited sense the recital may be looked upon as true, but it is also possible that it may be a mis-recital. Such mis-recitals are not absolutely unknown even in Acts which have been framed by skilled and careful draftsmen. In any case, however, the argument for the plaintiff seems to me so overwhelming that even if the adoption of it would involve that there was a mis-recital in the Act of 1849, I should feel bound to give effect to it" (*m*).

In *R. v. Hardy* (*n*), in directing a grand jury, Eyre, C.J., in speaking of the recitals in the Treason Act, 1351, said: "I presume I hardly need give you this caution, that though it has expressly been declared by the highest authority that there do exist in this country men capable of meditating the destruction of the constitution under which we live, that declaration being extra-judicial, is not a ground upon which you ought to proceed." But Bayley, J., in *R. v. Sutton* (*o*), said: "The preambles to the two Acts of Parliament, I think, are still more free from objection than the proclamation, and they assume as facts that outrages did exist. When we consider in what manner an Act of Parliament is passed, and that it is a public proceeding (*p*) in all its stages, and challenges a public inquiry, and when passed is in contemplation of law the act of the whole body (*q*), it seems to me that its recital must be taken as admissible evidence, and in this case was confirmatory evidence"; and in the same case Lord Ellenborough (*r*) said: "Next it is objected that the Acts of Parliament were not evidence. For what purpose, then, are the Judges bound to take judicial notice of public Acts of Parliament but in order that they may have a knowledge of them themselves and communicate it to others? The Judge is bound, not only to take judicial notice of their contents himself, but to state it to the jury; for if he is not to state the same, for what purpose is he to take notice of them? . . . Public Acts of

(*k*) As to false recitals, see argument of Serjeant Manning in *Baron de Bode v. R.* (1845), 3 H. L. C. 449, 460; 6 St. Tr. (N.S.) 237.

(*l*) [1905] 1 K. B. 219, 231.

(*m*) Affirmed on appeal, [1906] A. C. 286.

(*n*) (1794), 24 St. Tr. 199, at p. 204.

(*o*) (1816), 4 M. & S. 532, 549. The Acts referred to were 52 Geo. 3, chapters 16 and 17 against destruction and rioting by the Luddites.

(*p*) I.e., a proceeding by or on behalf of the public.

(*q*) I.e., of the nation.

(*r*) *Ibid.* 542.

Parliament are binding upon every subject, because every subject is in judgment of law privy to the making of them, and therefore supposed to know them, and formerly the usage was for the sheriff to proclaim them at his county court; and yet what every subject is supposed to know, and what the Judge is bound judicially to take notice of, it is said the jury cannot advert to, for if this evidence was inadmissible it must be because the jury could not be charged with it." The reasoning of Lord Ellenborough and Bayley, J., leads further than they followed it. An Act of Parliament is not evidence in the ordinary sense of the term, but a declaration of the will of the Legislature on the subject to which it relates. Words of enactment are clearly separable from the motives or beliefs which lead to legislation. So far as the enactment is concerned, it is "*sic volo, sic jubeo, stet pro ratione voluntas.*" But so far as a preamble recites facts *in pais*, other considerations apply. It is incontrovertible in law that the recitals motived the enactment, but it does not therefore follow that the recitals are true or conclusive in fact upon individuals: for the omnipotence of Parliament does not extend to facts, nor imply its infallibility (s). Yet if Judge or jury were free to controvert the motives of an enactment, and its recitals were to be merely admissible in evidence, it might be contended that to deal with them otherwise than as a conclusive decision upon a question of fact would be either—

- (a) Not to take judicial notice of the recitals; or
- (b) To decide that the statute, being based on false recitals, was not binding.

The *via media* between these two alternatives is to regard the preamble as conclusive in so far as it elucidates the intention of Parliament expressed in the enacting part, but as *prima facie* evidence only of the matters of fact, in the same way as recitals in old deeds are by section 2 of the Vendor and Purchaser Act, 1874.

As the oldest Acts were in the form of a grant with recitals, it was always conceivable that the King might be deceived in his grant, but the *onus* of proof was on the person who challenged the correctness of the recitals; and it seems to be now settled that no Court can impugn the validity of a statute on such a ground. In any case, in this respect recitals are in a different position from the enacting part, which is conclusive even if based on erroneous inferences as to fact or law. In *Labrador Co. v. R.* (t), a question was raised whether the recognition by the Legislature of Canada (19 Vict. c. 3) of a certain *seigneurie* as existing must be judicially accepted, or could be overridden by evidence of mistake. Lord Hannen, in delivering the

(s) In *R. v. Greene* (1837), 6 A. & E. 548, evidence was admitted to show that a place described as an existing borough in the schedule to the repealed Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), was not an existing borough. In the case of private legislation, the truth of the preamble is now inquired into, and the Bill is not allowed to proceed unless the preamble is proved. See May (15th ed.) pp. 949, 956, Taylor, Evidence, s. 1660.

(t) [1893] A. C. 104, 123.

opinion of the Judicial Committee, said: "Even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made, the Legislature alone can correct it. The Act of Parliament has declared that there was a *seigneurie* of Mingan, and that thenceforward its tenure shall be changed into that of *franc alleu*. The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination."

Judicial notice. The Courts are occasionally asked to infer the existence of a statute which is not of record in order to give effect to the judicial rule of endeavouring to find a legal origin for a well-established usage (*u*). This is an attempt to extend to statutes the presumption as to the lost grants, and seems to be based on the original identity in form between royal charters and statutes.

An instance of this contention is to be found in *Chilton v Corporation of London* (*x*), where the inhabitants of a parish claimed by custom a right to lop wood within a manor. Jessel, M.R., there said: "But then it is said, though the right is not known to the common law, it may be created by Act of Parliament, and the Judge is bound to assume, when not disputed by the pleadings, that it has been so created. The answer to that is simply, that the Judge is theoretically bound to take notice of all Acts of Parliament; that is, he is bound theoretically to know the contents of them, and to be aware that there is no such Act of Parliament. I say 'theoretically,' but practically the Judge requires attention to be called to the particular statute, and the clauses and sections of it that bear on the matter in hand. But he is bound to take judicial notice of all Acts of Parliament; and even on demurrer, which is our strictest form of pleading, any Act of Parliament can be taken notice of without being pleaded on either side." But it is submitted that this statement of the law is too wide.

The duty of the Judges to take judicial notice of a statute is confined to public Acts (*y*). Private Acts must be both pleaded and proved, unless by a special clause in the Act in question or by section 9 of the Interpretation Act, 1889 (*z*), judicial notice is to be taken of them (*a*).

Text and editions admissible.

3. When the authenticity and validity of a statute are ascertained, the next questions arising upon its construction are the correctness of the text vouched and the mode of solving any doubts arising on that head. In case of doubt as to the text of a statute which is to be judicially noticed, it is for the Judges to refer to the record or document

(*u*) *Phillips v. Halliday* (1889), 23 Q. B. D. 48, 54, Bowen, L.J., affirmed, [1891] A. C. 228; and see *Saltash Corporation v. Goodman* (1883), 7 App. Cas. 633.

(*x*) (1878), 7 Ch. D. 735, 740.

(*y*) Co. Litt. 98 b.

(*z*) Which re-enacts 13 & 14 Vict. c. 21, s. 7. See *post*, App. B.

(*a*) See Taylor, s. 1523; Roscoe, *Nisi Prius* (20th ed. (1934)). p. 106.

containing the most authentic copy of the statute. From this point of view statutes fall into four classes—

- (1) Statutes passed before the invention of printing which are of record;
- (2) Like statutes not of record;
- (3) Statutes passed since the invention of printing, printed and circulated by authority; and
- (4) Like statutes unprinted, or printed and not so circulated.

Old Acts of record. Most Acts between 1278 and 1487 appear on the Statute Roll preserved in the Record Office, which is a record of Chancery on which most of the statutes of the period were entered when drawn up in form for proclamation and publication (*b*). There is a gap from 8 Hen. 6 to 23 Hen. 6, owing to the Wars of the Roses. It would seem that the roll was made up till 4 Hen. 7. The last statute preserved in the Statute Roll form is also the first of which no Latin or French version is extant (*c*).

Statutes not of record. Coke and Hale say that some of the earlier statutes are not of record (*d*); subsequent research however has shown them to be in error as to most of the Acts and ordinances which they specify as unrecorded. Unrecorded statutes are from time to time discovered in reprinting documents in the Record Office (*e*), but those so found are not of any practical value or present legislative validity.

Whether of record or not, a statute is equally binding if its authenticity is once ascertained (*f*), and evidence of its promulgation is, as already said, not required.

The original Acts. Acts from 1487 to 1849, with few exceptions (*g*), are among the original Acts in the custody of the Clerk of the Parliaments, which show the original text as engrossed in black letter (*h*), with all subsequent additions and erasures, and indorsed with the signatures of the Clerks of both Houses. Of this a transcript, which was much more legible than the original, was made and certified by the Clerk of the Parliaments, and sent to the Rolls House (*i*).

The present practice is that as soon as an Act has received the Royal Assent, a print of it in the form in which it was finally agreed to is prepared in the Public Bill Office of the House of Lords and carefully examined to ensure that the amendments have been correctly inserted.

(*b*) 1 *Statt. Realm*, Intr. p. xxxiv. 1810, published by the Record Commission.

(*c*) 1 *Rev. Statt.* (2nd. ed.), p. 235.

(*d*) *Ruffhead's Statt.*, vol. i, Pref. p. xxiv; Hale, *Hist. C. L.*, ch. 1; *College of Physicians v. Cooper* (1675), 3 *Keb.* 587; *Statt. Realm*, vol. i, Intr. p. xxxii.

(*e*) *E.g.*, a statute forbidding Jews to hold land, in *Gesta Abbatum Sti. Albani*, vol. i, pp. 402—404, 523.

(*f*) The documents in which they are preserved usually contain evidence of promulgation.

(*g*) *Vide* 1 *Cliff.* 328. Some of these Acts have never been printed.

(*h*) 1 *Cliff.* 322-3.

(*i*) Sir John Romilly stated in *Barrow v. Wadkin* (1857), 24 *Beav.* 327, that he had inspected the Parliament Roll in his keeping as Master of the Rolls to discover the punctuation in section 3 of the 13 *Geo.* 3, c. 21, of 1773.

Paper prints of the Act are placed on sale to the public, and printed copies are referred to as evidence in courts of law. The original prints (j) may be seen, when necessary, and copies taken on the payment of certain fees.

Since 1851 the majority of private Acts have been printed by the King's printers and contain a clause declaring that a copy so printed shall be admitted as evidence thereof.

Inquiry into the printed editions of the statutes may be material—

- (1) As to the authenticity of an Act;
- (2) Its proof in judicial proceedings; or
- (3) The accuracy of the text vouched.

Record Commission edition. For ordinary purposes as to statutes earlier than 1713 reference is usually made to the folio edition of the Statutes of the Realm published by the Record Commission (1811–1828), the text of which is adopted in the revised editions of the statutes (k).

It also contains (Intr. p. xlix) a *catalogue raisonné* of all editions published by public or private venture before 1811, all of which it has for practical purposes superseded. The origin of the folio edition and the *modus operandi* of the editors deserve brief notice.

In 1800 the House of Commons presented an address to the Crown asking that directions should be given for the better preservation, arrangement and more convenient use of the public records of the kingdom (l). In consequence, a Royal Commission was appointed in the same year, whose first resolution was that a complete and authentic collection of the statutes of the realm be prepared, including every law, both those repealed or expired and those now in force, with a chronological list of them and a table of their principal matters. As a result of the labours of this Commission, the statutes of the realm up to 1713 were published between 1811 and 1828.

This edition contains—

- (1) All instruments contained in any general collection of statutes published prior to that of Serjeant Hawkins in 1735;
- (2) Such matters of a public nature purporting to be statutes as were introduced by him or subsequent editors, particularly Cay and Ruffhead, whose edition was published in 1762–1764; and
- (3) Such new matters of the like nature as could be taken from sources of authority not to be controverted—viz., statute rolls, enrolments of Acts, exemplifications, transcripts by writ, and original Acts.

(j) *Supra*, p. 35. n. (j)

(k) 1 *Statt. Realm*, Intr. p. xxv. The sources from which the statutes printed are derived, and the *variae lectiones*, are indicated in these editions.

(l) 1 *Statt. Realm*, Intr. p. viii.

Acts since 1713. Of all public and many private Acts passed since 1713 King's printer's copies are obtainable. They used to be printed in three forms—folio, quarto and octavo. A Committee of the House of Commons in 1835 recommended discontinuance of the folio and quarto editions, but the folio was not dropped till 1881, and the quarto is still published.

Till 1886 Acts of Parliament, when printed, subject to the promulgation list (p. 32 *ante*), became the private property of the King's printers, who had the monopoly of their publication, and did not act merely as agents of the Crown. But in 1881 a Select Committee of both Houses recommended that this arrangement should be discontinued, and that Acts of Parliament should be printed and sold under the same regulations as other parliamentary papers (*m*).

By the Documentary Evidence Act, 1882, the Stationery Office was put into the position of the King's printer with reference to public documents which are by statute evidence, or conclusive evidence, if purporting to be printed by the King's printer.

Since 1886 statutes and all parliamentary papers and public documents emanating from the different departments of Government are printed for and issued by the Stationery Office, and letters patent have been issued to the controller of the office constituting him the King's printer.

The revised statutes. Doubts as to the correctness of any of these revised editions can only be solved by reference to the original documents referred to above. In no case is the official print made conclusive evidence as to the text of a statute (*n*). But the revised editions may now be said to have attained the position of an authorised version of the statutes, by the effect of section 35 (2) of the Interpretation Act, 1889 (*o*).

Where any Act passed after December 31, 1889, contains a reference to any Act by its short title or regnal year, the reference, unless a contrary intention appears, is to be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of Acts not so included, and passed before 1714 (1 Geo. 1), to the edition prepared under the direction of the Record Commission, and in other cases to the copies of the statutes purporting to be printed by the King's printer, or under the superintendence or authority of H.M.'s Stationery Office (*p*). The Interpretation Act only authorises the version for

(*m*) Parl. Pap. 1881, No. 356.

(*n*) The first print of the Elementary Education Act, 1891, was withdrawn, as not embodying the tenor of the Act as ultimately assented to by Parliament. See Chitty's Statutes (6th ed.), vol. iv, tit. Education p. 251 (*x*). The Companies Act, 1907 (7 Edw. 7, c. 50, repealed), as originally printed contained errors in the heading to ss. 7, 8 and the wording of s. 15. The Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6, c. 40), s. 11 (5), as originally printed contained a reference to "section six" instead of to "section seven."

(*o*) *Post*, Appendix B. Provisions to the like effect used to be inserted at the head of the repeal schedules annexed to Statute Law Revision Acts.

(*p*) See Parl. Pap. 1881, No. 356, p. vii, and Documentary Evidence Act, 1882.

parliamentary purposes, such as recital or repeal, and leaves untouched the question of the accuracy of the text or the validity of the statutes. But in substance it constitutes the editions named as part of the official text of the Statute-book.

Scottish Acts. It was the exclusive privilege and official duty of the Lord Clerk Register to enter the Acts of the Scottish Parliament in the proper record, and to furnish copies to sheriffs, magistrates of burghs, and such as might demand them.

Scottish Acts were first printed in 1541 by virtue of an ordinance of James V, which directed the Clerk Register to make authentic copies, so far as concerned the common weal (*i.e.*, except copies of private Acts), under his hand, to be printed by what printer he chose.

In 1592 and 1607 the Scottish Parliament directed the printing and publication of the editions of Scottish Acts prepared by Sir John Skene, Clerk Register (*q*), which are received as the authorised text.

In pursuance of a resolution of the Record Commission in 1867 a folio edition of the Scottish Acts was prepared on the same lines as the Statutes of the Realm. Vols. 2–11, containing the statutes for 1424–1707, were published in the year 1814, and vol. 1, containing earlier statutes, was published in 1844. Many obsolete Acts were repealed in 1906 (*r*), and a revised edition of the ante-Union Acts still unrepealed was published in 1908 (*s*).

There is no statutory provision for the proof in English legal proceedings of any Act of the Scottish Parliament.

Irish Acts. The Irish statutes were printed in 1765 in folio in pursuance of the order of the Lord-Lieutenant (the Earl of Halifax), to give effect to a resolution of the Irish House of Lords that an edition of the statutes should be prepared under the inspection of the Lord Chancellor and Judges. This edition has always been accepted in the Courts in Ireland (*t*). But reference can now also be made to the revised edition of the statutes of Ireland (1310–1800) published by authority in 1888 (*u*).

Acts of the pre-Union Irish Parliament may be proved in legal proceedings in Great Britain by producing a copy purporting to have been printed by the official printer (*x*).

Translations of earlier statutes.

4. The statutes were recorded in Latin or Norman French until the death of Richard III. In the first Parliaments of Henry VII the practice seems to have continued, but no printed edition in French has been discovered. From 1488 (4 Hen. 7) the Statute Roll was no

(*q*) 1 Statt. Realm, Intr. pp. xliii, lxxix.

(*r*) 6 Edw. 7, c. 38.

(*s*) See Ilbert, p. 26.

(*t*) 1 Statt. Realm, Intr. p. lxxxv.

(*u*) Rev. Statt. Ireland, Pref., p. v.

(*x*) The Crown Debts Act, 1801, s. 9

longer made up in the ancient form (y), and the statutes have been published in English only.

The English translations published in the revised statutes are not always accurate, and have no legislative validity. The source from which each is derived is stated in the Statutes of the Realm and Statutes Revised.

Pleading statutes.

5. It is laid down by Sir John Comyns (Dig. tit. Action upon Statute, G, H, I) that in both criminal and civil pleadings upon a statute the statute must be recited, except where the statute merely extends a right or remedy already existing at common law.

In civil proceedings. Since 1875, when the Judicature Acts came into force, this rule no longer holds good in its entirety; for, according to the modern rule of civil pleading, facts only are to be stated (z). Nothing need be stated of which the Courts will take judicial notice. Consequently, public general Acts need not be specially pleaded in the High Court, save in a few cases—viz., that of the Statutes of Frauds and Limitations (a), and those by which a defendant was permitted to plead the general issue (b). In certain actions of debt upon statutes it appears still to be necessary to specify the Act upon which the action is based (e.g., 25 Geo. 2, c. 36, s. 11 (1752), payment of expenses to prosecutors of felonies). But this kind of action is quasi-criminal upon a penal statute (c). But it appears to be still expedient to plead an Act, private, local, or personal in its nature, even if it contains a clause requiring judicial notice to be taken of it; and apparently also any enactment vouched as an exception to the general law. In an action upon a penal statute, it appears to be still prudent, if not essential, to state the offence substantially in the words of the statute.

In criminal proceedings. In pleading a statutory offence in an indictment the rule at common law was that the offence should be stated substantially in the words of the statute. But now, by virtue of the Indictments Act, 1915, and the Rules made thereunder, the offence is to be stated in ordinary language with a reference to the section of the statute creating the offence (d). The statute in such case is referred to by its short title, and it is not necessary to give the regnal year or chapter. With reference to offences punishable on summary conviction, the common law rule is adopted with modifications by section 45 of the Summary Jurisdiction Act, 1879.

(y) 1 Rev. Statt. (2nd ed.), p. 228, n.

(z) R. S. C., Ord. 19, r. 4.

(a) R. S. C., Ord. 19, r. 15.

(b) R. S. C. Ord. 19, r. 12; Ord. 21, r. 19. Most of these enactments are repealed by s. 2 of the Public Authorities Protection Act, 1893, but the effect of the repeal is somewhat doubtful.

(c) See *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354.

(d) Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 3 (1), and rule 4 in the Schedule to that Act.

Mode of citation.

6. *Citation of old Acts.* Many ancient statutes are cited by the name of the place where the Parliament was held in which they were made; e.g., the Provisions of Merton and Statutes of Westminster (e).

Others are named from their subject-matter, e.g., *Articuli Cleri* (9 Edw. 2) and the statute *de Donis Conditionalibus* (13 Edw. 1, c. 1), and the Statutes of Jewry (f).

A third class are named from their initial words, e.g., *Quia Emptores* (18 Edw. 1, c. 1) (g).

Later statutes. Most statutes from the first year of Edward I onwards are divided into Chapters and from the reign of Henry VIII onwards the separate Chapters usually have titles descriptive of their subject-matter, such as "An Act concerning Uses and Wills" (27 Hen. 8, c. 10). About the same time there arose the custom of dividing the Chapters into sections. The proper way to cite any Act was by giving its full title together with the regnal year and chapter. But by Lord Brougham's Act (13 & 14 Vict. c. 21) the necessity for citing in Acts of Parliament the title of any earlier Act therein referred to was (as to all Acts passed since 7 Hen. 7) done away with, and it was sufficient to cite only the regnal year and session and the chapter. But the cumbrous mode of citation by the full title was still used in pleadings and other instruments. Now, by the Interpretation Act, 1889 (h), in any Act, instrument or document any Act may be cited either (a) by its short title without reference to the regnal year or chapter, or (b) by reference to the regnal year and chapter.

Modern Acts. Before 1793 few Acts had any titles other than the full descriptive titles by which they are headed in the Statute book: and in many cases these titles are very long and cumbrous. But most modern public Acts have short titles by which they may be cited. It is now usual to insert in an Act a section declaring a short title by which it may be cited. And if it is an amending Act, it is commonly enacted that the Act itself and the principal and other amending Acts may be cited together by a collective title, such as "The Merchant Shipping Acts, 1894 to 1950" (i). A large number of Acts which had not short titles when originally passed have since received them, first by the Short Titles Act, 1892 (k), and afterwards by the Short Titles Act, 1896 (l), which amplifies and embodies the earlier Act, and more recently by the Statute Law Revision Act, 1948 (m), s. 5, Sched. II. The Act of 1896 also gives collective titles to many groups of Acts *in pari materia*.

(e) 1 Bl. Comm. ed. Hargrave, p. 86, n. A useful note as to old English statutes by Joseph H. Beale will be found in 35 Harvard Law Review 519.

(f) 4 Co. Inst. 25.

(g) Comyns, Dig., tit. Action upon Statute, I.

(h) 52 & 53 Vict. c. 63, s. 35. App. B.

(i) 14 Geo. 6, c. 9.

(k) 55 & 56 Vict. c. 10.

(l) 59 & 60 Vict. c. 14.

(m) 11 & 12 Geo. 6, c. 62.

The mode of citation by regnal year and chapter was formerly used by the draftsmen of statutes relating solely to Scotland (*n*), who usually described a statute as "the Act [twenty and twenty-one] Victoria, chapter [seventy-two]" (*o*). The draftsmen of English Acts before, and very often since, 1890, describe a recited Act which has no short title as "an Act of (or passed in) the session held in the and years of H Majesty , intituled, &c.," with, or until recently without, mention of the chapter (*p*).

In India and some of the Dominions and colonies, Acts are cited by the secular year and a serial number, *e.g.*, Act No. V. of 1880 (*q*).

Erroneous citation. Under the old system of pleading, where the statute was the basis of a claim or defence, and was not referred to by way of inducement only, any variance in the description, even such as reference to the wrong regnal year, was held fatal (*r*).

When a session began in one regnal year and continued into another, an Act passed in the session could not be pleaded as having been passed in both years, but had to be described as having been passed either in a session held in both years, or in the year in which it received the royal assent, according as the Act was prior or subsequent to 1793 (*s*).

Even in modern times it is doubtful whether leave would be given to amend a wrong reference in the case of a plea of not guilty by statute (*t*), and in the case of *James v. Smith* (*u*), Kekewich, J., refused to allow amendment when the wrong section of the Statute of Frauds had been pleaded.

Commencement of statute.

7. Until 1793, when no date was fixed for the commencement of a statute, it was held to come into force on the first day of the session on which it was passed, and consequently all Acts passed in the same session were considered to have received the royal assent on the same day. The rule is stated by Coke in 4 Inst. 25, and was acted upon in several early cases, though it does not appear to have been finally settled till the decision of the House of Lords in *Att-Gen. v. Panter* (*x*). This rule was obviously inconvenient by reason of its

(*n*) But see the Allotments Act, 1887, s. 4.

(*o*) See 53 & 54 Vict. c. 67, s. 29.

(*p*) See 53 & 54 Vict. c. 45, s. 28 (1); c. 47, s. 1 (2); 54 & 55 Vict. c. 8, s. 12 (3), (4), (5).

(*q*) The statutes of Victoria and South Australia are numbered in a continuous series without regard to the year in which they were passed.

(*r*) *Partridge v. Strange* (1553), Plowd. 78, 79; *Bryant v. Withers*, (1813), 2 M. & S. 123, 132; and cf. *Dunn v. Mustard* (1899), 1 Fraser (Justiciary) 81.

(*s*) *Gibbs v. Pike* (1841), 8 M. & W. 223, 228, Parke, B.; cf. *R. v. Biers* (1834), 1 A. & E. 327.

(*t*) Now abolished in most cases by s. 2 of the Public Authorities Protection Act, 1893.

(*u*) [1891] 1 Ch. 384.

(*x*) (1772), 6 Bro. P. C. 486.

retrospective operation, and was often found to work injustice (y); and where two Acts passed in the same session were repugnant, it was impossible before 1793, as Lord Tenterden pointed out in *R. v. Middlesex* (z), to know which of the two ought to be held to repeal the other.

The Acts of Parliament Commencement Act, 1793 (a), after reciting the old rule that "every Act of Parliament in which the commencement thereof is not directed to be from a specific time, doth commence from the first day of the session of Parliament in which such Act is passed," and that "the same is liable to produce great and manifest injustice," enacts "that the Clerk of the Parliaments shall indorse (in English) on every Act of Parliament which shall pass after the 8th day of April, 1793, immediately after the title of such Act, the day, month, and year when the same shall have passed and shall have received the royal assent; and such endorsement shall be taken to be a part of such Act, and to be the date of its commencement: where no other commencement shall be therein provided." In the printed copies this date is placed on the first page of the Act, just below the full title, and for the Parliament Roll the Clerk of the Parliaments prefixes the certificate to the vellum print of the statute.

Unless a contrary intention clearly appears, the expression "the passing of this Act" in a statute means the date of the royal assent, and not the date fixed by the Act at which all or certain parts of it are to come into operation (b).

The Courts were bound to take judicial notice of the beginning and end of prorogations and sessions of Parliament (c). As to Acts passed before 1793, they used to discharge this duty by holding any misrecital of the date of an Act fatal (d), until, to avoid the risk, the ingenuity of the pleader introduced the phrase: "Against the form of the statute (or statutes) in that case made and provided" (e).

(y) See *Latless v. Holmes* (1792), 4 T. R. 660; *R. v. Bailey* (1800), Russ. & Ry. 1; *Bryant v. Withers* (1813), 2 M. & S. 123, 131. Cf. Parliament Act, 1949, s. 1, which provides that the Parliament Act, 1911, shall have effect and shall be deemed to have had effect from the beginning of the session in which the Bill for this Act (of 1949) originated with the amendments made by the Act of 1949.

(z) (1831), 2 B. & Ad., 818, 821, where two Acts are repugnant, the one which last received the royal assent should prevail.

(a) 33 Geo. 3, c. 13.

(b) See *Re Dalzell, ex p. Rashleigh* (1875), 2 Ch. D. 9; folld. in *R. v. Smith* (1909), 26 T. L. R. 23; *R. v. Weston*, [1910] 1 K. B. 17, 24, 25, distinguishing *Wood v. Riley* (1868), L. R. 3 C. P. 26. *Tomlinson v. Bullock* (1878), 4 Q. B. D. 230 (an Act comes into operation from the commencement of the day on which it received the royal assent).

(c) *R. v. Wilde* (1671), 1 Lev. 296.

(d) *R. v. Biers* (1834), 1 A. & E. 327.

(e) *Palgrave v. Windham* (1718), 1 Str. 214.

CHAPTER IV

CLASSIFICATION OF STATUTES

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Statute defined.

1. The word "statute" in English law (a) has always meant "an Act of Parliament" in the proper sense of the word. "If an Act be penned," says Coke in *The Prince's Case* (b), "that the King with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it (c), *scil.* the King, the Lords, and the Commons, or otherwise it is not an Act of Parliament," *i.e.*, the triple assent of concurrence of the three legislative estates is necessary to make an Act of Parliament (d). Now, however, the Parliament Act, 1911 (e), in certain events dispenses with the consent of the Lords. The Government of Ireland Act, 1914, was enacted "by and with the advice and consent of the Commons, in this present Parliament assembled, in accordance with the provisions of the Parliament Act, 1911, and by authority of the same." The expression "statute" is used in contradistinction to the "common law" and to "ordinance" (f), which, as Coke points out (g), differ from a statute in this, that every statute must be made by the King with the assent of the Lords and Commons, and if it appears by the Act that it was made by two only, it is no statute, but merely an ordinance. "Many

(a) When used by the civilians "statute" meant the whole municipal law of the State, from whatever source emanating. See Dwarria 485; Sedgwick 33.

(b) (1605), 8 Rep. 20 b.

(c) Some of the earliest documents treated as statutes lack this triple assent, *e.g.*, 20 Hen. 3 (Provisions of Merton) and *Quia Emptores* (18 Edw. 1, c. 1).

(d) Dicey: Constitution, 9th ed., 407; *Stockdale v. Hansard* (1839), 9 A. & E. 1, 108, Denman, C.J.

(e) See note (c) p. 34 *ante*.

(f) The laws of Crown Colonies are termed ordinances, as are the Acts of the Long Parliament. In Protectorates and newly acquired possessions the Crown sometimes legislates by proclamation or Order in Council (*per rescriptum principis*). (See *R. v. Crewe* (Earl), *ex p. Sekgomé*, [1910] 2 K. B. 576; Jenkyns, Rule and Jurisdiction Beyond the Seas, and *post*, Part II, chap. ix.)

(g) 1 Inst. 159 b. Prof. Plucknett, in "Statutes and their Interpretation," chap. ii, argues that there was never any distinction between statutes and ordinances.

ancient statutes are penned in the form of charters, ordinances, commands or prohibitions from the King without mentioning the concurrence of lords or commons, yet inasmuch as they have always been acquiesced in as unquestionably authentic this establishes and confirms their authority, and this defect is solved by such universal reception" (h). A charter granted by Edward III to the citizens of London and expressed to be made "*de assensu prælatorum comitum baronum ac totius communitatis regni in instanti Parlamento apud Westmonasterium convocato*" has been held to be at the most in the nature of what at this day we call a private or personal Act, a Parliamentary assurance (i). But in the *Wiltes Peerage Claim* (k) a solemn adjudication by the King in Parliament, with the assent of the peers at the request of the Commons, was held not to be a statute (l).

Resolutions of one House of Parliament. Resolutions of either House of Parliament are not equivalent to statutes (m), nor can such resolutions, by declaring breach of them to be a breach of privilege, oust the jurisdiction of the Courts to examine as to whether they bind the lieges (n). The resolution of any one of the three legislative estates cannot alter the law nor place anyone beyond its control (o), nor preclude the Courts from examining into the legality of acts done under the authority of the resolution (p).

Proclamations not statutes. The older documents or ordinances, which are accepted as having the force of statutes, must be carefully distinguished from proclamations. The Crown has no prerogative (q) right to legislate by proclamation (*per rescriptum principis*) for any part of the United Kingdom (r). The statute of 1539 (31 Hen. 8, c. 8), which for a time gave such power, was repealed in 1547 (1 Edw. 6, c. 12, s. 4), and a claim by James I to legislate by proclamation was defeated by the action of the Judges in the *Case of Proclamations* (s),

(h) Hawkins preface to Statutes (1735). As to the constitutional history of the development of legislation from the form of royal order into the form of a statute, see Anson, vol. i, 340; Ilbert, chap. 1.

(i) *Great Eastern Ry. v. Goldsmid* (1884), 9 App. Cas. 927, 936; *Islington Market Bill* (1835), 3 Cl. & F. 513.

(k) (1862-69), L. R. 4 H. L. 126, 158.

(l) See 2 Gneist, Const. Hist., 22, n.

(m) *The Prince's Case* (1605), 8 Co. Rep. 20 b; *Stockdale v. Hansard* (1839), 9 A. & E. 1; 3 St. Tr. (N.S.) 723, 884; *Barrow v. Arnaud* (1846), 8 Q. B. 595, 604; *Ex p. Wallace* (1892), 13 N. S. W. Rep. 1.

(n) *Stockdale v. Hansard, ubi sup.*, 162, Denman, C.J.; Anson, vol. i, p. 103; Dicey: Constitution, 9th ed., 54.

(o) This proposition is distinct from the constitutional rules as to the privileges of either House of the High Court of Parliament, as to which see *Burdett v. Abbot* (1811), 14 East 1; May, 15th edit., 158.

(p) *Stockdale v. Hansard* (1839), 9 A. & E. 1, 203, Patteson, J.

(q) *Case of Proclamations* (1610), 12 Co. Rep. 74. Certain classes of proclamations merely announce an executive Act. Those proclamations which are issued under statutory authority are a form of subordinate legislation. See article by Mr. Alexander Pulling in Encycl. Laws of England (2nd edit.), vol. xi, p. 695; and Part II, chap. iii, *post*.

(r) As to legislation by proclamation for British possessions, see Part II, chap. ix, *post*.

(s) *Supra*

and the only notable instance of an attempt to legislate by proclamation in modern times is that of Lord Chatham in 1766, who imposed an embargo by proclamation upon all ships laden with wheat or wheat flour (*r*). Its illegality was recognised by an Act of Indemnity passed in 1767 (7 Geo. 3, c. 7). This rule extends to treaties, which acquire no force within the realm by proclamation or except by statutory recognition (*u*).

The term "statute" at one time was taken as meaning all the Acts of one session, but it has long been used as equivalent to a separate Act, as distinct from the enactments included therein.

"*Statutes at large*." The term "statutes at large," first employed in the edition of Barker published in 1587, is used in distinction to the abridgments of the statutes, frequently published before that date (*w*).

Attempts to classify statutes.

2. Various attempts have been made to classify the statutes according to the real or supposed difference of the rules of interpretation to be applied, and although the rules which govern their interpretation and effect, as will be seen (*x*), do not vary much in the different classes, still it is desirable, if only as a matter of nomenclature, before considering the rules, to indicate the chief methods of classification which have been adopted. "The most popular division of Acts of Parliament," says Wynne, in *Dialogue III*, vol. ii, p. 99, "arises from considering them as public or private, temporary or perpetual, remedial or explanatory, in affirmance or derogation of common law." The main divisions recognised are made with reference to—

- (a) The time when the Acts were passed;
- (b) Their extent;
- (c) Their contents or subject-matter;
- (d) Their object;
- (e) Their method; and
- (f) Their duration.

Classification by date.

3. The earliest division is into "*vetera*" and "*nova statuta*." This classification is first found in Coke's *Institutes*. The *vetera statuta* include all statutes or ordinances (*y*) recognised as having the force of law, which are either earlier than the reign of Edward III or *incerti temporis*. Those from the reign of Edward III have been styled

(*r*) Anson, vol. i, pp. 344, 345.

(*u*) *Walker v. Baird*, [1892] A. C. 491.

(*w*) See 1 *Statt. Realm*, Intr., p. xxiii.

(*x*) See the rules as to construing penal statutes, Part III, *post*.

(*y*) See Co. Litt. 159 b, and Dwaris 460; Bacon's *Abridgment*, tit. Statute (7th edit.), 431.

nova statuta. But few of the former now remain on the Statute-book (z). Of the remaining statutes many only declare the common law, and few have come under judicial consideration (a) in recent years except the Statutes of Merton, Westminster (b), Marlbridge (c), and Gloucester (d), and the statute *de Donis Conditionalibus* (e).

The main distinctions between these earlier enactments and those of later date are—

1. The greater difficulty in authenticating their text and legislative validity; and
2. The greater latitude permitted or taken in their construction by the earlier Judges and text-writers, whose opinions would now be regarded as *contemporanea expositio* (see *post*, p. 76).

Classification by extent.

4. Classification by reference to the extent of the operation of an Act is unsatisfactory.

(a) *Old classification*. The mediæval Judges seem to have roughly divided the statutes into *general* and *special* (f), and to have decided, as to the first class, that they would notice them judicially in the same way as they noticed the common law or custom of the realm which the statutes declared or altered, and, as to the second class, that they would treat them, like local customs, as exceptions on the general law requiring special proof (g). This led to a second classification, into *public* and *general* (h) as distinguished from *private* and *special*, which was thrown into confusion by the practice introduced in the eighteenth century of inserting in special Acts a clause requiring them to be deemed public Acts; moreover, it was held that general Acts might contain private clauses (i).

(b) *Modern history of classification*. Till the end of 1797 "local and personal Acts to be judicially noticed" were numbered and printed with the public Acts, and the only distinction recognised was between *public* and *private* Acts. In the class of private Acts were included estate Acts, divorce Acts, naturalisation Acts, and also drainage and inclosure Acts (k).

(z) They take up in text and translation only seventy-four pages of the Revised Statutes (3rd edit.)

(a) See 2 Reeves History of English Law, 3rd ed. 1884, 85, 354; Dwaris 460; Bacon, Abridgment, tit. Statute (7th edit.) 431; Comyns, Dig., tit. Parliament, R.

(b) *Robinson v. Dhuleep Singh* (1878), 11 Ch. D. 798.

(c) *Avis v. Newman* (1889), 41 Ch. D. 532.

(d) *Mount v. Taylor* (1868), L. R. 3 C. P. 645.

(e) *Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

(f) See 1 Blackstone Comm. 86; May, 15th ed. 834.

(g) The term "special Act" is now used in another sense in Clauses Acts. In those Acts the expression "the special Act" means the Act incorporating a Clauses Act (see p. 207 *post*).

(h) As to the views thereon held in 1798, see Ilbert 48, n.

(i) *Ib.* 49, n.

(k) Ilbert 28.

1798—1803. From 1798 to 1803 the statutes were divided into three classes—

- (1) Public general;
- (2) Local and personal, declared public and to be judicially noticed;
- (3) Private and personal, not to be judicially noticed.

The last class was not ordered to be printed at all (*l*).

1803—1813. From 1803 to 1813 the classification was—

- (1) Public general Acts;
- (2) Local and personal Acts, to be judicially noticed;
- (3) Local and personal Acts, not printed.

1814—1868. From 1814 to 1868 the classification was—

- (1) Public general Acts;
- (2) Local and personal Acts declared public;
- (3) —(i) Private Acts printed by the King's printer;
and

(ii) Private Acts not so printed (*m*).

1814—1850. From 1814 until 1850 a clause was inserted in all the Acts in sub-class (i) to the following effect:—

“And be it further enacted, that this Act shall be printed by the several printers to the King's most excellent Majesty duly authorised to print the statutes of the United Kingdom, and a copy thereof so printed by any of them shall be admitted as evidence thereof by all judges, justices, and others.”

1850—1868. In 1850, by Lord Brougham's Act (*n*), it was provided that every Act passed after June 10, 1850, should be deemed and taken to be a public Act, and should be judicially taken notice of as such, unless the contrary was expressly provided and declared by such Act. This provision is now embodied in section 9 of the Interpretation Act, 1889 (*o*), as a general rule of construction, and its effect is to make all modern Acts with few exceptions public Acts, so far as judicial notice by the Courts is concerned (*p*).

Since 1868. Since 1868 the class “local and personal” has been altered to “local,” all personal Acts being relegated to the class “private Acts”: and in the tables of the statutes a distinction is made between public Acts of a local character and other local Acts by putting the mark P. before the former, which mainly consist of provisional order confirmation Acts and marriage validation Acts (*q*). But it is clear that this distinction has no judicial significance, and in no way alters the rules of construction applicable to the Acts in question. The private Acts are divided into (i) those printed by the

(*l*) *Ibid.* 49.

(*m*) Clifford Private Bill Legislation vol. I, 267.

(*n*) 13 & 14 Vict. c. 21, s. 7.

(*o*) 52 & 53 Vict. c. 63.

(*p*) See p. 41 *ante* and Appendix B, *post*.

(*q*) For a list of such Acts printed among the public general Acts, see Chronological Table and Index to Statutes (edit. 1945), vol. ii, Appendices.

King's printer, (ii) those not so printed. There is no index of local and private Acts prior to 1801 (*r*). A classified list of these passed between 1801 and 1899 was published in 1900 under the authority of the Statute Law Committee.

Acts are now classified as *public* or *private* and as *general* or *local* or *personal*.

In the sense in which lawyers use the terms, a public Act is one which is judicially noticed, a private Act is one which has to be proved in a Court of justice. Every Act passed after the year 1850 is public in this sense unless the contrary is expressly provided in the Act. This classification obviously does not correspond with the classification of Bills in Parliament into public and private.

The term "private" in the Standing Orders of both Houses includes all Bills affecting the interests of particular localities, and not of a general public character (*s*). It covers local and personal Bills. Private Bills are brought in on petition and are subject to parliamentary fees; and they are usually referred to private Bill committees. All other Bills are public. The classification of Acts into general Acts and local and personal Acts is a classification of Acts according to the extent of their operation. Bowen, L.J., thus described the difference between general Acts and local and personal Acts: "A general Act *prima facie* is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area and as regards the individual in its effects. And as opposed to that you get statutes which may well be public because of the importance of the subjects with which they deal and their general interest to the community, but which are limited in respect of area—a limitation which makes them local—or limited in respect of individuals or persons,—a limitation which makes them personal" (*t*). "General" and not "public", he says further, is opposed to "local and personal"; and the division therefore lies between public and general Acts on the one side, and public and local and personal Acts on the other, because, of course, a local and personal Act may be public without losing its character of local and personal.

(*r*) In Roscoe's *Nisi Prius*, 20th ed., 1934, p. 107, are stated the sources of information as to private Acts passed before 1801.

(*s*) Clifford, *Private Bill Legislation*, vol. i, 267; *Standing Orders of House of Commons* (1948); and of the *House of Lords* (1905, Nos. 165 and 177); *Ilbert* 49, n; and see *May*, *Parliamentary Practice*.

(*t*) *R. v. London County Council*, [1893] 2 Q. B. 454, 462. In *Mayor of London v. Netherlands Steam Boat Co.*, [1906] A. C. 263, 269, Lord Davey, discussing certain Acts, says: "I confess I am surprised to hear the Act of 1812 (52 Geo. 3, c. 49) and the subsequent Act of 1832 (2 & 3 Will. 4, c. 66) described as local and personal Acts. The Act of 1812 must have been brought in and promoted by the Treasury on behalf of the Crown, and the effect was to authorise the application of public money in the purchase of a site for the erection of a new Custom House, and also to impose a large annual charge on the consolidated customs which were part of the public revenue. According to constitutional usage such purposes could only be effected by a public Act, and I think that the Acts both of 1812 and 1832 ought to be treated as public Acts."

(c) *King's printer's classification.* In the King's printer's editions of the statutes, statutes are now classed as follows—

1. Public General Statutes, *i.e.*, those Acts which are of general application and are judicially noticed.
2. Local, *i.e.*, relating to a limited area.
These may be either—
 - (a) Public, *i.e.*, judicially noticed.
 - (b) Not public.
3. Private Acts (*u*), relating to the affairs of individuals, such as their estates, marriage or divorce.
These may be either—
 - (a) Printed by the King's printer.
 - (b) Not so printed.

Classification by subject-matter.

5. The only serious attempt to classify Acts by their subject-matter is that made in the chronological table and index of the statutes, now published annually under the direction of the Statute Law Committee. But it only deals with public general Acts (*x*).

Classification by object.

6. Most of the judicial terms applied to Acts relate to their objects. Acts are, from this point of view, described as declaratory, codifying, remedial, enabling, or penal, and as being in affirmation or derogation of the common law.

(a) *Declaratory Acts.* If a doubt is felt as to what the common law is on some particular subject, and an Act is passed to explain and declare the common law, such an Act is called a *Declaratory Act*. The distinction between declaratory and remedial Acts was originally made with reference to their effect on the common law or custom of England, and not with reference to their explanation or repeal of prior statutes. An Act is said by Blackstone to be declaratory "where the old custom of the realm is almost fallen into disuse or become disputable, in which case Parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the law is, and ever hath been" (*y*).

For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective (*z*).

(*u*) See House of Commons Papers, 1833, vol. xii, p. 171, for an account by Sir F. Palgrave of the origin and history of these Bills; and see Jour. Soc. Comp. Leg. (N.S.) 1900, p. 81.

(*x*) See preface to the volumes; and see pp. 125 *et seq.*, *post*, as to statutes *in pari materia*.

(*y*) 1 Comm. 86. Magna Charta is for the most part declaratory. The Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), purports to be wholly so. See 3 Co. Inst. 1.

(*z*) Lord Coke, however, says that, "by reason of this word [declared], whereby it appeareth what the law was before the making of this Act, like cases in semblable mischief shall be taken within the remedy of such an Act": Co. Litt. 290; 1 Black. Comm. 86. See *post*, Part II, chap. vi.

The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a preamble, and also the word "declared" as well as the word "enacted." Thus, in *Price v. Bradley* (a), the Court decided eels to be fresh-water fish within 41 & 42 Vict. c. 39. This decision was regarded by Parliament as a scientific error, and by 49 & 50 Vict. c. 2, it was *declared* that fresh-water fish in the first-mentioned Act did not include eels. A salient instance of a declaratory Act is the Territorial Waters Jurisdiction Act, 1878, passed in order to overrule the opinion of the majority of the Judges in *The Franconia Case* (b), as to the limits of British territorial waters. The preamble asserts, in defiance of the judicial majority, that "the right jurisdiction of Her Majesty, her heirs and successors, extends, *and has always extended*, over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions." The opinion of the minority in *The Franconia Case* has been therefore not merely enacted, but is declared to have been always the law (c).

Recent instances of declaratory Acts are the Bastardy (Witness Process) Act, 1929 (d); Laying of Documents before Parliament (Interpretation) Act, 1948 (e); and the Ireland Act, 1949 (f), s. 1 (2).

(b) *Codifying Acts*. Codifying Acts are Acts passed to codify the existing law (g). That is, not merely to declare the law upon some particular point, but to declare in the form of a code the whole of the law upon some particular subject. Thus the Bills of Exchange Act, 1882 (h), is "An Act to codify the law relating to Bills of Exchange, Cheques and Promissory Notes." Other branches of the law have been codified by the Partnership Act, 1890 (i), the Sale of Goods Act, 1893 (k), and the Marine Insurance Act, 1906 (l).

Consolidating Acts. Analogous to these are Consolidating Acts, the object of which is to consolidate in one Act the provisions contained in a number of statutes as, for example, the Companies Act, 1948, the Patents Act, 1949. They may be regarded as Acts codifying the statute law upon a subject.

As a result of the Consolidation of Enactments (Procedure) Act,

(a) (1885), 16 Q. B. D. 148.

(b) *R. v. Keyn* (1876), Ex. D. 63.

(c) *R. v. Dudley* (1884), 14 Q. B. D. 273, 280, 281. Cf. Merchant Shipping (Seamen's Allotment) Act, 1911.

(d) 19 & 20 Geo. 5, c. 38.

(e) 11 & 12 Geo. 6, c. 59.

(f) 12 & 13 Geo. 6, c. 41.

(g) *Robinson v. C. P. Rail Co.*, [1892] A. C. 481.

(h) 45 & 46 Vict. c. 61.

(i) 53 & 54 Vict. c. 39.

(k) 56 & 57 Vict. c. 71.

(l) 6 Edw. 7, c. 41.

1949 (*m*), there may now, in the process of consolidation, be made such corrections and minor improvements as ought to be made (*n*). The expression "corrections and minor improvements," means amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, a removing of unnecessary provisions or anomalies which are not of substantial importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated, and includes any transitional provisions which may be necessary in consequence of such amendment (*o*). The Matrimonial Causes Act, 1950 (*p*), and the Adoption Act, 1950 (*q*), were enacted under this procedure.

(*c*) *Remedial Acts*. A Remedial Act is defined by Blackstone (*r*) as one made to "supply such defects and abridge such superfluities in the common law as arise, either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (and even learned) Judges, or from any other cause whatever." But this definition is too narrow, for the operation of remedial Acts is not confined to the common law, but extends also to prior enactments. In earlier Acts the grievance is usually recited in the preamble, and the statute resembles in form a petition for redress of grievances, for which the existing law was insufficient (see 23 Hen. 8, c. 5, Commissions of Sewers, preamble), and in many Acts the words "for remedy whereof" immediately preceded the words of enactment. In modern public Acts a preamble is usually dispensed with, and the nature of the grievance, if any, to be remedied is left to be gathered from the tenor of the title and enacting part.

Remedial Acts are subdivided by Blackstone into *enlarging* and *restraining* Acts, the former widening the common law where it was too strict or narrow, the latter taking away or cutting down rights existing at common law. His instance of an enlarging Act is 5 Eliz. c. 11, which made it treason to clip the current coin of the realm. A more happy example would be that of the statutes increasing the powers of tenants for life to deal with settled lands, which would match Blackstone's instance of 13 Eliz. c. 10, restricting the powers of leasing by spiritual corporations. Both terms are in truth purely relative. The same statute may be "enlarging" as to one set of persons, "restraining" as to others. Every creation of a new offence enlarges the scope of the criminal law and restrains *pro tanto* the liberty of individuals (*s*). The Irish Land Acts enlarged the rights and interests

(*m*) 12 & 13 Geo. 6, c. 33.

(*n*) S. 1. The proposals are to be embodied in a memorandum which is subject to the approval of a joint committee of both Houses of Parliament (*ibid.*).

(*o*) *Ibid.* s. 2.

(*p*) 14 Geo. 6, c. 25.

(*q*) 14 Geo. 6, c. 26.

(*r*) 1 Comm. 80.

(*s*) See *Re Bellencontre*, [1891] 2 Q. B. 122, 141, Wills, J.

of the tenant, and restricted those of the landlord. Indeed, the same Act may be "remedial" from one point of view and "penal" from another (r). And almost every statute, except Appropriation Acts, may be described as *remedial*, since its passing presupposes some grievance which the Act is intended to rectify. Even a Statute Law Revision Act or a Consolidation Act remedies the grievance of the prolixity, complexity and undigested redundancy of the contents of the Statute-book.

(d) *Enabling Acts*. A statute which makes it lawful to do something which would not otherwise be lawful is called an *enabling* Act (u).

The most ordinary instances of such statutes are to be found in Acts which authorise land to be taken compulsorily in order to carry out some public work, or legalising what would otherwise be a public or private nuisance. But many other things can only be done by Act of Parliament; for instance, as Cockburn, C.J., said in *R. v. Twiss* (v), "Nothing short of an Act of Parliament can divest consecrated ground of its sacred character"; and as the Judicial Committee pointed out in *Duranty v. Hart* (y), "Nothing short of an Act of Parliament can displace a decision of the Supreme Court." So in *Re Bishop of Natal* (z), the Judicial Committee said, "After the establishment of an independent Legislature in a colony, there is no power in the Crown by virtue of its prerogative, and without an Act of Parliament, to create a bishopric or other ecclesiastical corporation." So in *The Prince's Case* (a), it was pointed out that "a course of inheritance which is against the rules of the common law cannot be created by charter without the force and strength of an Act of Parliament." In *Brumfitt v. Roberts* (b), it appeared that by a private Act (2 & 3 Vict. c. xxxiii) a special interest in certain pews not known to the common law was created; similarly in *The Medway Navigation Co. v. Earl of Romney* (c), the Court recognised the creation by the 13 Geo. 2, c. 26, sec. 2, of a new species of statutory property and interest in water (d). And in *Montrose Peerage Claim* (e), Lord Cranworth said: "I take it to be a matter admitting of no controversy that . . . the effect [of the Act] was to destroy that creation [i.e., the Dukedom of Montrose]. It was not necessary that there should be any attainer. Parliament was omnipotent" (f).

(r) 11 Geo. 2, c. 19, s. 3, which enabled landlords to recover double the value of goods fraudulently removed or concealed by their tenants, was held to be remedial in *Stanley v. Wharton* (1821), 9 Price 301, but penal in *Hobbs v. Hudson* (1890), 25 Q. B. D. 232.

(u) See effect of Enabling Acts discussed Part II, chap. ii, *post*.

(v) (1869), L. R. 4 Q. B. 407, 412.

(y) (1863), 2 Moore P. C. (N.S.) 289, 313, note (b).

(z) (1864), 3 Moore P. C. (N.S.) 115, 148.

(a) (1605), 8 Co. Rep. 16 b.

(b) (1870), L. R. 5 C. P. 224.

(c) (1861), 30 L. J. C. P. 236, 240.

(d) Cf. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; affirmed, [1901] 2 Ch. 37.

(e) (1853), 1 Macq. H. L. (Sc.) 401, 404.

(f) See the Earldom of Mar Restitution Act, 1885 (48 & 49 Vict. c. 48).

Classification by method.

7. The terms "*Obligatory*," "*Permissive*," "*Mandatory*," or "*Imperative*," and "*Directory*" (g) seem to have reference to the method by which the Legislature sets about attaining its object.

The epithets "*Obligatory*" and "*Permissive*" are applied to enabling statutes according as the persons affected by such statutes have or have not an option as to doing the thing which the statute deals with. If there is no option, the statute is called "*obligatory*," but if there is, it is called "*permissive*" (h).

The epithets "*Imperative*" and "*Mandatory*" are used with reference both to enabling Acts and to statutes which create duties. A statute which creates a duty is called "*imperative*," if it is not optional whether that duty be performed or not, and the same term applies to Acts imposing a condition satisfaction whereof is essential to the validity of the act or document as to which it is imposed.

In *Young v. Mayor, etc., of Leamington* (i), it was in dispute whether section 174 (1) of the Public Health Act, 1875, enacting that contracts made by an urban sanitary authority, whereof the value exceeded £50, should be in writing and sealed with the common seal of the authority, was imperative or directory. The Court of Appeal and the House of Lords decided that it was imperative, and that a contract not so sealed was void although executed, and that, although the sanitary authority had obtained the benefit of it, they were free from the usually correlative obligation of payment.

When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called *imperative* or *absolute*; but those which are not essential, and may be disregarded without invalidating the thing to be done, are called *directory* (k).

It has been held in Ireland that statutes are to be construed as mandatory and imperative when they prescribe acts to be done by private parties, but are only directory when they require public officers to do the acts, in which case the default or mistake of the officers will not destroy the rights of the parties (l). But this decision is inadequate. An Act may be mandatory upon a public officer, and may expressly or implicitly render him liable to punishment for disobedience to its provisions, without also exposing private persons to any civil or

(g) Sedgwick, p. 318, points out that it is somewhat singular that the epithet "*directory*" should be used in this sense when applied to statutes, whereas, strictly speaking, it is synonymous with "*mandatory*." In *Entwistle v. Dent* (1848), 1 Ex. 812, 823, Pollock, C.B., used the word with regard to a commercial letter of instructions in the sense of "*mandatory*," by reference to the Roman law term *mandatum*.

(h) See *Fleming and Ferguson Ltd. v. Burgh of Paisley*, 1948 S. C. 547.

(i) (1883), 8 App. Cas. 517.

(k) See *post*, Part II, chap. ii; and *R. v. London JJ.*, [1893] 2 Q. B. 476, 491, Bowen, L.J. *Montreal Street Rail Co. v. Normandin*, [1917] A. C. 170, 174; *Bank View Mill Ltd. v. Nelson Corporation*, [1943] K. B. 337.

(l) *Plunkett v. Malley* (1863), 8 Ir. Jur. (N.S.) 83, 86.

criminal liability or loss by reason of the default of the official. On the other hand, although the officer may be liable for a breach of duty, the performance by him of the duty may be a condition precedent to the attaching of the civil rights of other persons. Thus, if a book or design is not registered, the owner cannot sue for infringement, even though non-registration is due to default of an official, who can be compelled by mandamus to register, or be punished in criminal or civil proceedings for his default. So if an elector's name is omitted from the register he cannot contend that the provisions of the Registration Acts are directory. His only remedy is by action (*m*) or by appeal from the registration officer to the County Court and thence to the Court of Appeal under the Representation of the People Act, 1949 (*n*).

Classification by duration.

8. Acts are also classified, by reference to their duration, as temporary or perpetual.

(a) *Temporary*. Temporary statutes are those on the duration of which some limit is put by Parliament. The Standing Orders of Parliament (*o*) require a time clause to be inserted in such Acts. The Expiring Laws Continuance Acts usually contain a specific date for the expiry of the continued Acts.

(b) *Perpetual*. Perpetual Acts are those upon whose continuance no limitation of time is expressly named or necessarily to be understood. They are not perpetual in the sense of being irrevocable (*p*).

These classes are more fully dealt with in Part II, ch. vi.

(*m*) See *R. v. Hall*, [1891] 1 Q. B. 747.

(*n*) 12, 13 & 14 Geo. 6, c. 68, see *ibid.* s. 45.

(*o*) H. C. 1906, No. 45; H. L. 1905. The best known of these Acts is the Army and Air Force (Annual) Act, whose temporary duration depends on constitutional considerations. For a list of these Acts, see Parl. Pap. 1893, c. 320, and the annual Expiring Laws Continuance Act.

(*p*) Dicey, Constitution 9th ed. 64.

PART I

CONSTRUCTION OF STATUTES

CHAPTER I

GENERAL RULES OF CONSTRUCTION WHERE THE MEANING IS PLAIN

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Meaning and legal effect distinguished.

1. "It is well at the outset to guard against confusion between *the meaning* and *the legal effect* of expressions used in a statute. The expression 'construction' as applied to a document, at all events as used by English lawyers, includes two things—first, the meaning of the words; and secondly, the effect which is to be given to them. The meaning of words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law" (a). Strictly speaking, there is no place for interpretation or construction except where the words of a statute admit of two meanings (b). As Scott, L.J., said: "Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute" (c). "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive, if possible, at their meaning without, in the

(a) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, 85, Lindley, L.J.

(b) Bell, Dict. Law of Scotland, tit. Statute.

(c) *Croxford v. Universal Insurance Co.*, [1936] 2 K. B. 253, 281.

first place, reference to cases" (d). Rules of construction have been laid down because of the obligation imposed on the Courts of attaching an intelligible meaning to confused and unintelligible sentences (e).

If meaning plain, consequences to be disregarded.

2. *Construction according to intention.* The cardinal rule for the construction of Acts of Parliament is that *they should be construed according to the intention of the Parliament which passed them* (f). "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view" (g). If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver (h).

"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature" (i).

The rule now under review is expressed in various terms by different Judges. The epithets "natural," "ordinary," "literal," "grammatical," and "popular" are employed almost interchangeably, but their indiscriminate use leads to some confusion, and probably the term "primary" (j) is preferable to any of them, if it be remembered that the primary meaning of a word varies with its setting or context and with the subject-matter to which it is applied; for

(d) *Per Warrington, L.J., in Barrell v. Fordree*, [1932] A. C. 676, 682.

(e) *Thring*, p. 52.

(f) In *Tasmania v. Commonwealth* (1904), 1 Australia C. L. R. 329, on a question as to the meaning of the Constitution of the Australian Commonwealth, O'Connor, J., said (at p. 358): "I do not think that it can be too strongly stated that our duty in interpreting a statute is to declare and administer the law according to the intention expressed in the statute itself. In this respect the Constitution differs in no way from any Act of the Commonwealth or of a State." See also as to Canadian Constitution, *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, 586, and "Judicial Interpretation of the Constitution Act of the Commonwealth of Australia," 30 Harvard Law Review 595.

(g) *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394, 412, Lord Blackburn, cited by Lord Atkinson in *London and India Docks Co. v. Thames Steam Tug, etc., Co.*, [1909] A. C. 15, 23.

(h) Rule declared by the Judges in advising the House of Lords in the *Sussex Peerage Claim* (1844), 11 Cl. & F. 85, 143; 6 St. Tr. (N.S.) 79; and accepted by the Judicial Committee in *Cargo ex Argos* (1872), L. R. 5 P. C. 134, 153. Cf. *Tasmania v. Commonwealth*, *supra*, 339.

(i) *Warburton v. Loveland* (1831), 2 D. & Cl. (H. L.) 480, 489, Tindal, C.J., and to the same effect: *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431, 510; *Att.-Gen. v. Noyes* (1881), 8 Q. B. D. 135, 139; *Hornsey L. B. v. Monarch Investment Building Society* (1889), 24 Q. B. D. 1 (Lord Esher, M.R. and Lindley, L.J.); *M'Cowan v. Baine*, [1891] A. C. 401, 409 (Lord Watson); *Salomon v. Salomon*, [1897] A. C. 22, 38 (Lord Watson); *Sutters v. Briggs*, [1922] 1 A. C. 1, 8, *per Lord Birkenhead*.

(j) See *Elphinstone, Interpretation of Deeds*, chap. iv.

reference to the abstract meaning of words, if there be any such thing, is of little value in interpreting statutes.

Intention of Legislature not to be speculated on. In *Salomon v. A. Salomon & Co. Ltd.* (k), Lord Watson said: "'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication" (l). After expounding the enactment, it only remains to enforce it, notwithstanding that it may be a very generally received opinion that it "does not produce the effect which the Legislature intended" (m), or "might with advantage be modified" (n). It would appear that statutes imposing import duties must be interpreted in the light of their object, i.e., to protect the home producer (o). And although it is allowable (p) and sometimes desirable, for a Court which is called upon to interpret a statute to acquaint itself with the history of the statute and of the circumstances under which it was passed; and even to compare it with any similar statutes passed in other countries, and to examine decisions of British and even of foreign Courts upon similar statutes, still it must be borne in mind, as Pollock, C.B., said in *Att.-Gen. v. Sillem* (q), "If a statute, in terms reasonably plain and clear, makes what the defendants have done a punishable offence within the statute, we want not the assistance which may be derived from what eminent statesmen have said or learned jurists have written . . . we want not the decisions of American Courts to see whether the case before us is within the statute."

And even though a Court is satisfied that the Legislature did not contemplate the consequences of an enactment, a Court is bound to give effect to its clear language. Thus Lord Herschell in *Cox v. Hakes* (r), said: "It is not easy to exaggerate the magnitude of this change [i.e., that discharge from custody by a Court of competent Jurisdiction does not protect from further proceedings]; nevertheless, it must be

(k) [1897] A. C. 22, 38. *Lord Howard de Walden v. I.R.C.*, [1948] 2 A. E. R. 825, 830.

(l) Quoted by Lord Porter in *Commonwealth of Australia v. Bank of New South Wales*, [1950] A. C. 235, 307. In a New Zealand case, the rule is thus put: "The object of an Act and its intent, meaning and spirit can only be ascertained from the terms of the Act itself": *Pitches v. Kenny* (1903), 22 N. Z. L. R. 818, 819, Williams, J.; *R. v. Crown Milling Co. Ltd.*, [1925] N. Z. L. R. 753, 815. See also "Statutory Interpretation," 43 Harvard Law Review 863 and 886.

(m) *Preston v. Buckley* (1870), L. R. 5 Q. B. 391, 394, Blackburn, J.

(n) *General Iron Screw Co. v. Moss* (1861), 15 Moore P. C. 122, 131.

(o) *Newman Manufacturing Co. v. Marrable*, [1931] 2 K. B. 297. *Powell Lane Manufacturing Co. v. Putnam*, [1931] 2 K. B. 305.

(p) *Post*, p. 120. See also rules in *Heydon's Case*, *post*, p. 91.

(q) (1863), 2 H. & C. 431, 508.

(r) (1890), 15 App. Cas. 506, 528.

admitted that, if the language of the Legislature, interpreted according to the recognised canons of construction, involves this result, your lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature."

No statute may be treated as void. From this rule several consequences follow: first, that no statutory enactment (s) may be treated as null and void or unconstitutional (t). Blackstone says (u): "If Parliament would positively enact a thing to be done which is unreasonable, there is no power in the ordinary forms of the Constitution that is vested with authority to control it." There are, indeed, *dicta* in the books which go to show that certain Judges have considered that Acts of Parliament might, under certain circumstances, be declared to be and treated as null and void. Thus in *Dr. Bonham's Case* (x), Coke says that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void" (y). There is, however, no instance of any British (z) statute having ever been declared null and void, or as the Judicial Committee put it in *Logan v. Burslem* (a), "not binding, if it is contrary to reason"; for "the examples usually alleged . . . do none of them prove that where the main object of a statute is unreasonable the Judges are at liberty to reject it, for that were to set the judicial power above that of the Legislature, which would be subversive of all government" (b). In *Lee v. Bude, etc., Ry.* (c), where it was argued that certain Acts of Parliament had been obtained by inserting in them false recitals, "I would observe," said Willes, J., "that these Acts of Parliament are the law of the land, and we do not sit here as a court of appeal from

(s) As to colonial laws, see 28 & 29 Vict. c. 63, s. 3, and Part II, chap. ix, *post*.

(t) The expression "unconstitutional," as applied to an English Act of Parliament, merely means that the Act in question, as, for instance, the Irish Church Act, 1869, is, in the opinion of the speaker, opposed to the spirit of the English Constitution; it cannot mean (as it might if applied to a French or an American Act) that the Act is either a breach of law or void (Dicey: Constitution 9th ed. 91). It is sometimes argued that the Acts of Union are not amendable: but both have been amended (Dicey: Constitution 9th ed. 64). As to what were formerly the constitutional powers of the law-making bodies in India, see *Bell v. Madras Municipal Commissioners* (1902), 25 Madras 457, 474, Bhashyam Ayyangar, J.; Ilbert, Govt. of India (1st edit.) 223, 226; (2nd edit.) 220, 223; The Constitutional Law of England (Varma and Gharekhan) 1934, and The Government of India Act (25 & 26 Geo. 5, c. 42).

(u) 1 Comm. 91.

(x) (1610), 8 Co. Rep. 114 a.

(y) See also *Day v. Savadge* (1614), Hob. 85; *City of London v. Wood* (1701), 12 Mod. 669; and *Duchess of Hamilton v. Fleetwood* (1714), 10 Mod. 115, and notes to the case above cited.

(z) Statutes of the United States or of British Colonies may be declared by Judges to be *ultra vires* by reference to their constitutions; see Part II, chap. ix, *post*. Dicey: Constitution 9th edit. 92 *et seq.*

(a) (1842), 4 Moore P. C. 284, 297.

(b) 1 Bl. Com. 91; and see Dicey: Constitution 9th ed. 61.

(c) (1871), L. R. 6 C. P. 576, 580.

Parliament. It was once said (d) that if an Act of Parliament were to create a man a Judge in his own cause, the Court might disregard it. That *dictum*, however, stands as a warning rather than as an authority to be followed. If an Act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it; but so long as it exists as law the Courts are bound to obey it." And the same view was expressed by the Judicial Committee in *Labrador Co. v. R.* (e).

Construction ut res magis valeat quam pereat. A statute, even more than a contract, must be construed, *ut res magis valeat quam pereat*, so that the intentions of the Legislature may not be treated as vain or left to operate in the air (f). Even rules of international law are to be regarded merely as aiding to a construction of ambiguous enactments, and not as controlling British Acts. Although "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law" (g), the Judges may not pronounce an Act *ultra vires* as contravening international law but may recoil, in case of ambiguity from a construction which would involve a breach of the ascertained and accepted rules of international law (h).

Casus omissus not to be created or supplied. A second consequence of this rule is that *a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made* (i). "The intention of the Legislature, however obvious it may be, must no doubt in the construction of statutes be defeated where the language it has chosen compels to that result, but only where it compels it" (j). The Judges may not wrest the language of Parliament even to avoid an obvious mischief. When an Act contains a special saving of another Act, and omits all allusion to a third Act *in pari materia*, it is safer to presume that the omission is deliberate than that it is due to forgetfulness or made *per incuriam*. North, J., was of opinion that

(d) In *Day v. Savadge* (1614), Hob. 85, where it is laid down that "even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself."

(e) [1893] A. C. 104, 123.

(f) *Curtis v. Stovin* (1889), 22 Q. B. D. 512, 517, Bowen, L.J., *Hankey v. Clavering*, [1942] 2 K. B. 326, 330, Lord Greene, M.R.; *Hawtrey v. Beaufront, Ltd.*, [1946] K. B. 280.

(g) *Bloxam v. Favre* (1883), 8 P. D. 101, 104; (1884) 9 P. D. 130.

(h) See *post*, Part II, chap. viii.

(i) For good instances of *casus omissi* (afterwards remedied by the Legislature), see *R. v. Arnold* (1864), 5 B. & S. 322, and *R. v. Denton (Inhabitants)* (1864), 5 B. & S. 821. The mere fact that some certain point was not present to the mind of the draftsman when he drew the Act does not necessarily constitute that point a *casus omissus*. "Whether," said Bramwell, L.J., in *Ex p. Welchman* (1879), 11 Ch. D. 48, 55, "the draftsman had it in his mind or not is another question; but very often Courts have to discover what provision has been made for the happening of an event which was not in the contemplation of the person who drew the Act."

(j) See *London and India Docks Co. v. Thames Steam Tug, etc. Co.*, [1909] A. C. 15, 23, Lord Atkinson. In the application of the rule he differed from other Law Lords on the question whether the statute under interpretation did or did not create a particular exemption.

the Savings Bank Act, 1863, had probably been forgotten when the Bankruptcy Act, 1883, was drafted and passed, but "it seems to me that I cannot deal with it on any such footing as to suppose that that Act was forgotten. If it would have been put in if thought of but has been left out because it has been forgotten, the persons who claim under it cannot get any benefit under it. I cannot proceed on any surmise that it has been passed over *per incuriam* or that the whole matter was not before the Legislature when it passed the 40th section of the Act of 1883 . . ." (k).

The authorities on this subject are numerous and unanimous. "No case can be found to authorise any Court to alter a word so as to produce a *casus omissus*," said Lord Halsbury in *Mersey Docks v. Henderson* (l). In *Crawford v. Spooner* (m), the Judicial Committee said: "We cannot aid the Legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there."

In other words, the language of Acts of Parliament, and more especially of modern Acts, must neither be extended beyond its natural and proper limits, in order to supply omissions or defects (n), nor strained to meet the justice of an individual case (o). "If," said Lord Brougham, in *Gwynne v. Burnell* (p), "we depart from the plain and obvious meaning on account of such views (as those pressed in argument on 43 Geo. 3, c. 99), we do not in truth construe the Act, but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the Legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a *modern* statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no grounds to justify such a sort of interpretation." In *Jones v. Smart* (q), the question was whether a doctor of physic in a Scottish university was qualified to kill game under 22 & 23 Car. 2, c. 25, which enacted "that every person . . . other than the son of an esquire, or other person of higher degree . . . is declared to be a person by the law of this realm not allowed to have any guns . . . for

(k) *Re Williams, Jones v. Williams* (1887), 36 Ch. D. 573, 582.

(l) (1888), 13 App. Cas. 595, 602.

(m) (1846), 6 Moore P. C. 1, 8, 9. Cf. *Lord Howard de Walden v. I. R. C.*, [1948] 2 A. E. R. 825, 830.

(n) Even "if the language used is incapable of a meaning, we cannot supply one": *Green v. Wood* (1845), 7 Q. B. 178, 185, Lord Denman, C.J. Cf. *Pinkerton v. Easton* (1873), L. R. 16 Eq. 490, 492, Lord Selborne, L.C.

(o) In *Whiteley v. Chappell* (1868), L. R. 4 Q. B. 147, 149, Hannen, J., said: "It would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases." Cf. *Scott v. Legg* (1877), 10 Q. B. D. 236, 238, James, L.J.

(p) (1840), 7 Cl. & F. 572, 696. Cf. *Kumar Kamalajaran Roy v. Secretary of State* (1939), L. R. 66 Ind. App. 1, 10, Lord Wright.

(q) (1785), 1 T. R. 44.

taking game." Amongst other arguments for proving that a Scottish doctor of physic was qualified, it was contended that the Legislature could not have intended to exclude such a person. "Be that as it may," said Buller, J., in his judgment, "we are bound to take the Act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a Court of law, for that would be to make laws." As a general rule, as Blackburn, J., pointed out in *R. v. Cleworth* (r), if it appears that the class or thing which it is sought to bring within the Act (under consideration) was known to the Legislature at the time when the Act was passed, and that class is omitted, "it must be supposed to have been omitted intentionally." It makes no difference if it appears that the omission on the part of the Legislature was a mere oversight, and that without doubt the Act would have been drawn otherwise had the attention of the Legislature been directed to the oversight at the time the Act was under discussion. Thus, in *Lane v. Bennett* (s), it being admitted that Ireland was a place beyond the seas within the meaning of 4 & 5 Anne, c. 3, s. 19 (t), which enacted that if a defendant should be beyond the seas when a cause of action accrued, the plaintiff should be at liberty to sue him within a certain specified time after his return, it was contended that section 7 of the Civil Procedure Act, 1832, which enacted that Ireland should not be deemed to be beyond the seas so far as related to certain statutes (but without naming this statute of Anne) ought to be held to extend to this statute of Anne. "The great probability," said the Court, "is that the omission to name the statute of Anne is an oversight, but even if we were quite satisfied that it was so, we could not supply the defect." In *North Eastern Railway v. Leadgate* (u), Cockburn, C.J., said: "I cannot suppose that the Legislature would intentionally have drawn any distinction between a railway originally constructed by a private company and afterwards brought within the provisions of an Act of Parliament and used as a railway for public conveyance and a railway constructed under the powers of an Act of Parliament in the first instance; and I regret I cannot see my way to putting such a construction upon section 55 (of the Local Government Act, 1858) as would meet the equity of the case and include a railway like the present, though I have no doubt the Legislature would have drawn the clause so as to embrace the present case, had such a case been present to their minds." An extreme instance of the adoption of this rule is given in *R. v. Dyott* (x). The Poor Rate Act, 1743, s. 1, required publication of a rate in church as a condition precedent to its validity. The Parish Notices Act, 1837, s. 2, substituted for publication in church or chapel publication by affixing the notice on or near the door of the church or chapel. The Extra-Parochial Places Act, 1857, s. 1, made all

(r) (1864), 4 B. & S. 927, 934.

(s) (1836), 1 M. & W. 70.

(t) 4 Anne, c. 16, Ruffhead.

(u) (1870), L. R. 5 Q. B. 157, 161.

(x) (1882), 9 Q. B. D. 47, 49, Grove, J., 51, North, J.

extra-parochial places parishes for poor-law purposes. Among the places made parochial by this Act was Hopwas Hays in Staffordshire, which contained neither church nor chapel, and only one house, a gamekeeper's lodge. The validity of a poor rate made for the parish was in dispute, and the Queen's Bench Division decided that as the provisions of the enactments of 1743 and 1837 could not be complied with no valid rate could be made. Grove, J., said: "It would be making legislation, and not interpreting the language of the statutes, were the Court to say that the rate could be levied without any previous publication. It may be that where the language of a statute is merely directory, and it is impossible to follow the direction, the Court would give effect to the doctrine of *cy-près*, and say that the direction should be carried out as nearly as possible. The maxim, *Nemo tenetur ad impossibilia*, would then apply. But in this case the words of the statute are not directory, but positive and prohibitory. Very likely a provision for publishing a rate in places where there is no church or chapel was omitted from these statutes through a slip, but if so, it is for the Legislature to remedy it" (y). And North, J., in the same case said: "The question being whether the statute is to be treated as one in which notice has been deliberately dispensed with or has escaped observation, I come to the conclusion that it has escaped observation. It is a *casus omissus*, from which no inference can be drawn against the necessity of notice."

Courts will not relieve against express statutory provisions. A third consequence of this rule is that the High Court at the present day (z) declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provisions. This was clearly pointed out by Mellish, L.J., in *Edwards v. Edwards* (a). "If," said he, "the Legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a Court of equity say that in certain circumstances it shall be valid? The Courts of equity have given relief on equitable grounds from provisions in old Acts of Parliament, but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines." "Acts of Parliament," said Holker, L.J., in *Gibbs v. Guild* (b), "are omnipotent, and are not to be got rid of by declarations of Courts of law or equity." In *Curtis v. Perry* (c), the plaintiff prayed that certain ships which stood registered in the name of one Nantes should be

(y) In *Finney v. Godfrey* (1870), L. R. 9 Eq. 356, James, V.-C., read the requirement of the Act of 1837 as conditional on the existence of a church or chapel.

(z) In *Lindsay v. Lynch* (1804), 2 Schoales & Lefroy (Ir.) 1, 5, Lord Redesdale said that repeated attempts had been made "to put a Court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. It is, therefore, absolutely necessary to make a stand, and not carry the decisions further."

(a) (1876), 2 Ch. D. 291, 297. Cf. *Partington v. Att.-Gen.* (1869), L. R. 4 H. L. 100, 122, Lord Cairns.

(b) (1882), 9 Q. B. D. 59, 75.

(c) (1802), 6 Ves. 739.

declared to be his separate property, although it appeared that the ships had always been treated as part of the property of a firm of which he was a member with one Chiswell. Lord Eldon held that the plaintiff's prayer must be complied with, because the statutory enactment was precise and clear to the effect that every ship was to be considered as the property of the person in whose name it stood registered, and that if a transfer was made of a ship, *e.g.*, to the partnership, it must be made in the prescribed form under the Act. As the requirements of the Act as to transfer had not been complied with, the Court could not interfere in favour of the joint creditors after Chiswell's death and on Nantes' bankruptcy. Lord Eldon, L.C., said that where a contract had not been executed in accordance with the Act, it could not be reformed in equity. As Chiswell had no ownership the ships were not joint property but the separate property of Nantes.

But while Courts of justice cannot dispense with or override the express provisions of a statute by construing its express terms as subordinate to considerations of common law or equity, there are certain cases in which it has been held—

- (1) That people may contract themselves out of rights given them by statute, but not in terms made indefeasible (*d*);
- (2) That people may contract not to set up a defence given by statute (*e*);
- (3) That a person may waive or be estopped by his conduct from setting up a defence given him by statute (*f*).

There is very little authority for any of these propositions, and it is submitted that they are valid, if at all, only in cases where the statute merely deals with procedure or gives a private right which may be renounced, and are not applicable as against a specific mandatory or declaratory enactment (*g*).

It has been often said, with reference to the Statute of Frauds, that "Courts of equity will not permit the statute to be made an instrument of fraud." "By this," said Lord Selborne in *Alderson v. Maddison* (*h*), "it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it, and I agree with an observation made by Cotton, L.J., in *Britain v. Rossiter* (*i*), that this summary way of stating the principle (however true it may

(*d*) Some statutes expressly avoid contracts whereby persons contract out of the benefit of Acts of Parliament (see pp. 235, 558 *post*).

(*e*) See *Wright v. Bagnall*, [1900] 2 Q. B. 240; *East India Co. v. Paul* (1849) 7 Moore P. C. 85; *Supple v. Cann* (1858), 9 Ir. Ch. R. 1.

(*f*) *Wilson v. M'Intosh*, [1894] A. C. 129; *Taylor v. Clemson* (1844), 11 Cl. & F. 610, 643. In *Mackenzie v. Lord Powis* (1737), 7 Brown P. C. 282, the H. L. restrained the respondent from pleading the Statute of Limitations in an action at law to recover shares deposited with him in France by the appellant.

(*g*) These cases are distinct from those under which the Courts do not give the benefit of certain statutes unless they are specially pleaded. See p. 46, *ante*.

(*h*) (1883), 8 App. Cas. 467, 474.

(*i*) (1882), 11 Q. B. D. 123, 131.

be when properly understood) is not an adequate explanation either of the precise grounds or of the established limits of the equitable doctrine of part performance." He went on to point out—(1) That both at law (*k*) and in equity, section 4 of the Statute of Frauds had been held not to avoid parole contracts, but only to bar their remedies; and (2) that in the decisions in equity resting upon part performance, the defendant is charged on the equities arising out of the acts done in execution of the contract, and not within the meaning of the statute upon the contract itself.

It is only with reference to a few statutes that attempts have been made at equitable construction, and these attempts are justifiable only so far as they do not contravene the old rule of the Court of Chancery, which relieved from erroneous construction put upon statutes by Courts of law, under circumstances thus stated by Lord Hardwicke in *Basset v. Basset* (1): "There are several cases where, in consequence of an Act of Parliament, this Court will intervene. As where a new Act of Parliament is made to alter the law, and the Judges are formal in adhering to rules of law, and will not construe according to the words and intention of the Act, there the Court will take it up and will give remedy here, though it is the business of Judges to mould their practice so as to make it conformable to the Legislature."

Mere evasion not restrained by the Courts. A fourth consequence of this rule is that a Court of law cannot interfere to prevent a mere evasion (*m*) of an Act of Parliament. The word "evade" is ambiguous and has ordinarily two meanings, one suggesting underhand dealing, the other intentional avoidance of something disagreeable (*n*). From time to time devices have been invented especially to avoid payment of taxes and sections of the Annual Finance Act, e.g., that of 1938 and section 18 of the Act of 1926 have been designed to prevent this.

(*k*) *Crosby v. Wadsworth* (1805), 6 East 602, 611.

(1) (1744), 3 Atk. 203, 206.

(*m*) "There is always an ambiguity," said Lindley, L.J., in *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21 Ch. D. 309, 318, "about the expression 'evading an Act of Parliament'; in one sense you cannot evade an Act of Parliament; that is to say, the Court is bound so to construe every Act of Parliament, as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament, and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament." Again, in *Edwards v. Hall* (1855), 25 L. J. Ch. 82, 84, Lord Cranworth said: "I never understood what is meant by an evasion of an Act of Parliament; either you are within the Act or you are not within it; if you are not within it you have a right to avoid it, to keep out of the prohibition." And in *Jefferies v. Alexander* (1860), 8 H. L. C. 594, 637, Willes, J., said: "To say that what was done is an evasion of the law is idle, unless it means that, though in apparent accordance with it, it really was in contravention of the law." And see *per* Lord Campbell, *ibid.*, at p. 644. "The word 'evasion,'" said Grove, J., in *Att.-Gen. v. Noyes* (1881), 8 Q. B. D. 125, 133, "may mean either of two things. It may mean an evasion of the Act by something which, while it evades the Act, is within the sense of it, or it may mean an evading of the Act by doing something to which the Act does not apply."

(*n*) *Simms v. Registrar of Probates*, [1900] A. C. 323, 334, a decision of the Judicial Committee on a South Australian Revenue Act.

"People are not bound to continue in the same condition of things either as regards their direct or indirect taxation, which will render either the consumption of articles in the one case or the property they have in the other always liable to the tax" (o). "A person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That is evading in one sense but there is nothing illegal in it. The other is when a man goes to his solicitor and says 'tell me how to escape from the consequences of the Act of Parliament although I am brought within it.' That is an act of quite a different character" (p). In *Levene v. Inland Revenue Commissioners* (q), Lord Sumner said: "It is trite law that His Majesty's subjects are free if they can to make their own arrangements so that their cases fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them."

With respect to an Act of Parliament, evasion is used as meaning something which does not amount to a positive breach of, or fraud upon the Act. "There must, in every law, be marginal cases which come very near the point at which the statute may be avoided; and the persons intending to avoid the operation of a statute can always succeed by doing it directly. If a man with a mortal disease, although he knows he cannot live six months, chooses to convey his property to his heirs expectant, he may do so, and they will pay no succession duty. So, again, an old man may do so. He may hand over his property by a *bona fide* conveyance" (r). Such a mode of avoiding the effect of a statute was described by Grove, J., in *Ramsden v. Lupton* (s), as "getting away from the remedial operation of the statute while complying with the words of the statute." "An Act evaded is not an Act infringed" (t), and an arrangement which is designed "to defeat the intentions of the Legislature, and to enable a person to accomplish indirectly what he could not under the Act in question have done directly," will not necessarily be held on that account invalid by Courts

(o) *Howard de Walden (Lord) v. I. R. C.*, [1942] 1 K. B. 387, 397, Lord Greene, M.R. Cf. *Mackay v. Dixon*, [1944] 1 A. E. R. 22, 23, Scott, L.J.; *Att.-Gen. v. Duke of Richmond and Gordon*, [1909] A. C. 466.

(p) *Bullivant v. Att.-Gen. for Victoria*, [1901] A. C. 196, 202, Lord Halsbury, 207, Lord Lindley, a decision of the H. L. on a Revenue Statute of Victoria.

(q) [1928] A. C. 217, 227.

(r) *Att.-Gen. v. Noyes* (1881), 8 Q. B. D. 125, 137, Grove, J. See also *per Jessel*, M.R., at p. 140., and *Dewar v. Inland Revenue Commissioners*, [1935] 2 K. B. 351 (s) (1873), L. R. 9 Q. B. 17, at p. 32.

(t) *Ibid*, at p. 28, Bramwell, B. In the same case, at p. 30, Keating, J., said: "If that were the enactment, the Act would have been infringed—not evaded, but infringed." In *Ritchie v. Smith* (1848), 6 C. B. 462, 477, V.-Williams, J., described an agreement as one "by which the plaintiff co-operated with other persons for the purpose of contravening and evading the provisions of the Act," using the word "evade" as synonymous with "infringe"; and in *Re Meade* (1876), 3 Ch. D. 119, 121, Bacon, V.-C., made a similar use of the word. This does not seem to be the accepted meaning of the term.

of law (u). It has always been the pride of a competent conveyancer to be able, when required, to drive a coach and four, or six, through any Act of Parliament. In *Smale v. Burr* (x), it appeared that a bill of sale had been given by one Price to the plaintiff, but, instead of registering it before the expiration of the twenty-one days allowed for that purpose by the Bills of Sale Act, 1854, another bill of sale was given by Price to the plaintiff in exchange for the first. This was done fifteen or sixteen times, and ultimately the bill of sale last given was registered before the expiration of twenty-one days from the day on which it (the last bill) had been given. The plaintiff then sued the defendant, who had taken Price's goods in execution. The defence was that the transaction was fraudulent, and ought not to be upheld. It was held, however, that, notwithstanding that the transaction was clearly of a most fraudulent character, the requirements of the Act of 1854 had been complied with, and that consequently, although the spirit of the Act had been evaded, the bill of sale must be held to be valid. "I should have been extremely glad," said Denman, J., "if I could have found an authority which would have enabled us to defeat this bill of sale. But I find none." The Courts will, however, always examine into the real nature of the transaction by which it is sought to evade an Act (y). The Licensing Acts and the Bills of Sale Acts are daily evaded with success. But this can only be effected by acts which are clearly *casus omissi*, having regard to the meaning of the enactment as ascertained by the Courts, and not of course by individual judgment; for "Parliament would legislate to little purpose," said Lord Macnaghten (z), "if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own. People cannot escape from the obligation of a statute by putting a private interpretation on its language."

Fraud upon an Act not tolerated. As Abbott, C.J., said in *Fox v. Bishop of Chester* (a), it is a "well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance"; consequently, as Lord Coleridge said in *Wright v. Davies* (b), if a contract is "framed so as entirely to defeat the object of an Act of Parliament," such a contract, "though not within its express prohibition," might very well be held to be impliedly forbidden

(u) In *Barton v. Muir* (1874), L. R. 6 P. C. 134, 139, an arrangement which was sought to be enforced was described in these words by the Chief Justice of the Supreme Court of New South Wales, and on that account set aside by that Court; but this decision was reversed by the Judicial Committee. In *Davis v. Stephenson* (1890), 24 Q. B. D. 529, a deliberate and scarcely disguised attempt to evade a penal Act was held to have succeeded. See, too, *Att.-Gen. v. Duke of Richmond and Gordon*, [1909] A. C. 466, a decision on s. 7 of the Finance Act, 1894 (57 & 58 Vict. c. 30), where, by use of the Scottish Entail Acts, the burden of estate duty was reduced.

(x) (1872), L. R. 8 C. P. 64, 69, see now s. 9 of the Bills of Sale Act, 1878.

(y) *Re Watson* (1890), 25 Q. B. D. 27.

(z) In *Netherseal Co. v. Bourne* (1889), 14 App. Cas. 228, 247.

(a) (1824), 2 B. & C. 635, 655.

(b) (1876), 1 C. P. D. 638, 646.

by it. We accordingly find that a Court of law will not tolerate such an evasion of an Act of Parliament as amounts to a positive "fraud upon the Act," such an evasion being, as Lord Eldon described it in *Fox v. Bishop of Chester* (c), "a fraud on the law or an insult to an Act of Parliament." The expression "a fraud upon an Act" is used with reference to a transaction "which," as Lord Coleridge said in *Ramsden v. Lupton* (d), "no Court would give effect to, because it had no legal foundation from the beginning. It is rather difficult," continued he, "to put into any other form what exactly is meant by an arrangement that is a fraud upon an Act of Parliament of this sort. I perfectly understand the expression, and it may be a very legitimate one to use with regard to the bankruptcy laws, which are passed for different purposes, and an attempt to evade which, while complying with the letter of the statute, has been held by the Courts, and has repeatedly been decided to be, not a successful evasion of the statute, but such a colourable attempt to evade the statute as the Court would describe as a fraud upon it."

But the phrase "fraud upon an Act" is somewhat unfortunate, and there is, as Turner, L.J., said in *Alexander v. Brame* (e), "perhaps no question of law more difficult to determine than the question, what particular acts, not expressly prohibited, shall be deemed to be void as being against the policy of a statute. It is no doubt the duty of the Courts so to construe statutes as to suppress the mischief against which they are directed, and to advance the remedy which they are intended to provide; but it is one thing to construe the words of a statute, and another to extend its operation beyond what the words of it express." This question has often arisen in cases which turned upon the Statutes of Mortmain. "Prohibitory statutes," said Lord Cranworth in *Philpott v. St. George's Hospital* (f) (a case upon the Statutes of Mortmain), "prevent you from doing something which formerly it was lawful for you to do; and, whenever you find that anything done is substantially that which is prohibited, I think it is perfectly open to the Court to say that it is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things, actually prohibited." And if a statute has been passed for some one particular purpose, a Court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. The Public-Houses Amendment (Scotland) Act, 1862 (g), gave magistrates the power to close public-houses "in any particular locality" before the statutory hour. In *Macbeth v. Ashley* (h), it was held that, if the magistrates,

(c) (1829), 1 Dow & Cl. (H. L.) 416, 429.

(d) (1873), L. R. 9 Q. B. 17, 24.

(e) (1855), 7 De G. M. & G. 525, 539.

(f) (1857), 6 H. L. C. 338, 348.

(g) Repealed by 3 Edw. 7, c. 25.

(h) (1874), L. R. 2 H. L. Sc. 352.

under the guise of exercising this power, were to order the public-houses to be closed earlier, not merely in one particular locality. but in portion after portion of the whole district, until eventually all the public-houses in the whole district had been closed at the earlier hour, this would be, as Lord Cairns said, "adopting a course for the purpose of doing what I must describe as evading an Act of Parliament, and your lordships would not be prepared to sanction, but would discountenance and prevent, the exercise of a power so used" (i).

Contemporanea expositio.

3. *Terms to be read in their meaning at date of passing of Act.* The rule that the language used by the Legislature must be construed in its natural and ordinary sense requires some explanation. The sense must be that which the words used ordinarily bore at the time when the statute was passed. Said Lord Esher, M.R., in *Clerical, etc., Assurance Co. v. Carter (k)*, "There has been a long discussion of various puzzling matters in relation to the provisions of the Income Tax Acts, but, after all, we must construe the words of schedule D according to the ordinary canon of construction; that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced." Thus, the word "marriage," as used in an English statute, means the contract into which a man and woman enter in this country, and does not, therefore, include polygamy. "There is no magic in a name," said Lord Penzance in *Hyde v. Hyde (l)* (a case in which the validity of a Mormon marriage was discussed), "and if the relation there (in Utah) existing between a man and a woman is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two different relations will not make them one and the same, though it may tend to confuse them to a superficial observer." And

(i) An illustration of the way in which the intention of an Act of Parliament may be successfully evaded without contravening the letter of the enactment was afforded by the appointment, in November, 1871, of Sir Robert Collier as a member of the Judicial Committee. It was enacted by 34 & 35 Vict. c. 91, s. 1 (now repealed), that Her Majesty might, within twelve months after the passing of the Act, appoint four persons to act as members of the Judicial Committee of the Privy Council, but that any persons so appointed must be specially qualified as follows—that is to say, must, at that date of their appointment, be or have been Judges of one of Her Majesty's Superior Courts at Westminster. Sir Robert Collier, who, at the time of the passing of the Act, was Attorney-General, was in November, 1871, made a Judge of the Court of Common Pleas, and one week after his appointment, and without ever having acted as Judge, he was appointed under the above-mentioned Act as a member of the Judicial Committee. It was clear that this was a valid appointment, and no question was ever raised about it in any Court of law, but the Legislature, in passing the Act, cannot be supposed to have contemplated the use to which it would be put by the Government. In the House of Commons a motion condemning the appointment was lost by 241 to 268 (Hans. Parl. Deb. 3rd ser. 209, p. 758), and in the House of Lords by 87 to 88 (Hans. 3rd ser. 209, p. 461).

(k) (1889), 22 Q. B. D. 444, 448.

(l) (1866), L. R. 1 P. & D. 130, 133.

even with reference to marriages contracted abroad by British subjects, the term means monogamous marriages, whether Christian or not (*m*). In *Weatherley v. Weatherley* (*n*) Lord Jowitt, L.C., said that the law of the land cannot be co-extensive with the law of morals, nor can the civil consequences of marriage be identical with its religious consequences. The solution to the question which arises for determination in a divorce case cannot be settled on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament.

Rule modified as to colonial Acts. In applying this rule to colonial statutes in English, it must be modified so as to give effect to any difference between English and colonial usage as to the meaning attached to a word or phrase. For the term "marriage" in an Indian statute might include polygamous unions, having regard to the recognition of such unions in British India (*o*).

Many terms are used in dominion and colonial statutes in a sense different from that attached to them in England (*p*). And in the construction of the British North America Act, 1867, some divergence has arisen between the Canadian Courts and the Privy Council as to what is meant by "indirect taxation" (*q*). Where the colonial statute is expressed in French or Dutch as the sole or concurrent language of legislation, it must be read by reference to the colonial dialect of those languages, and not to the mother tongue, in the case of any divergence between the two.

The rule as to *contemporanea expositio* was first laid down by Coke (*r*), in speaking of Magna Charta, in the following terms: "This and the like were the forms of ancient Acts and graunts, and the ancient Acts and graunts must be construed and taken as the law was holden at that time when they were made." The earlier statutes were in the form of charters, and no difference was at first made between the construction of a statute and that of any other instrument (*s*). Coke's rule has been adopted by the English Courts, and for modern use is best expressed by Lord Esher in *Sharpe v. Wakefield* (*r*), "the words of

(*m*) See *Bethell's Case* (1887), 38 Ch. D. 220; *Brinkley v. Att.-Gen.* (1890), 15 P. D. 76. In old Acts about India "British subjects" seems to be taken as meaning "European British subjects": see Ilbert, *Govt. of India* (3rd ed.), 232, 235, 402-3, 412-13.

(*n*) [1947] A. C. 628.

(*o*) In India the validity of a marriage in the case of Hindus, Mohammedans, Jews, Buddhists, Sikhs and Jains is determined by reference to the usages of those religions and not, e.g., to the provisions of the Penal Code, ss. 494 *et seq.*: cf. *Peterswald v. Bartley* (1904), 1 Australia C. L. R. 497, as to the meaning of "duties of excise" in Australia.

(*p*) See *Bell v. Master in Equity* (1877), 2 App. Cas. 560, 565 (distinction between probate duty in England and the duty payable in Victoria).

(*q*) See *Pigeon v. Recorder's Court* (1890), 17 Canada 495, 503. *Re Foster and Raleigh* (1910), O. L. R. 26, 29. See also *Cotton v. R.*, [1914] A. C. 176. As to Colonial Statutes *in pari materia* see p. 130 *post*.

(*r*) 2 Inst. ed. Thomas, p. 2, n. (1).

(*s*) Parl. Pap. 1875, C. 208, p. 84. See pp. 3 *et seq. ante*.

(*t*) (1888), 22 Q. B. D. 239, 241, *affd.* [1891] A. C. 173.

a statute must be construed as they would have been the day after the statute was passed, unless some subsequent Act has declared that some other construction is to be adopted or has altered the previous statute" (u).

The same learned judge said in *The Longford* (x): "The first point to be borne in mind is that the Act (6 & 7 Will. 4, a private Act) must be construed as if one were interpreting it on the day after it was passed. . . . The word 'action' was not applicable when the Act was passed to the procedure of the Admiralty Court. Admiralty actions were then called 'suits' or 'causes'; moreover, the Admiralty Court was not called and was not one of His Majesty's Courts of Law."

"It has often been held," said Lord Cranworth in the *Montrose Peerage Claim* (y), "and not unwisely or improperly, that the construction of very ancient statutes may be elucidated by what in the language of the Courts is called *contemporanea expositio* (z); that is, seeing how they were understood at the time they were passed." "In construing ancient statutes," said Lawrence, J., in *Wilson v. Knubley* (a), "attention is always to be paid to the language of the times. The statute of 4 Edw. 3 (c. 7) speaks of a trespass as of a wrong generally, and when it enacts that executors shall have an action against the trespassers, it means thereby against wrongdoers generally." In *Smith v. Lindo* (b), Byles, J., said as to 6 Anne, c. 16 (5 Anne, c. 14, Ruffhead), "That statute was passed 150 years ago. Therefore, we must resort to the contemporaneous exposition of the words."

Contemporanea expositio ought rarely, if ever, to be applied to modern Acts. In *Trustees of Clyde Navigation v. Laird* (c), the question was whatever navigation dues were payable on timber floated down the river Clyde in logs chained together. From 1858 to 1882 dues had been levied and paid without protest under the Clyde Navigation Consolidation Act, 1858. On the question of non-resistance to payment of the dues, Lord Blackburn said: "I think that raises a strong *prima facie* ground for thinking there must exist some legal ground on which they [the merchants] could not resist, and I think a court should be cautious, and not decide unnecessarily that there is no such ground. If the Lord President means no more than this when he calls it '*Contemporanea expositio* of the statutes which is almost irresistible,' I agree with him." Lord Watson, however, said: "Such usage as has in this case been termed *contemporanea expositio* is of no value

(u) See *Evanturel v. Evanturel* (No. 1) (1869), L. R. 2 P. C. 462, 488.

(x) (1889), 14 P. D. 34, 36, quoted by Collins, M.R., in *The Burns*, [1907] P. 137, 146.

(y) (1853), 1 Macq. H. L. (Sc.) 401, 406.

(z) See also *M'Williams v. Adams* (1852), 1 Macq. 120; *Graham v. Irving* (1899), 2 Fraser (Sc.) 29, 35, 36.

(a) (1806), 7 East 128, 136.

(b) (1858), 27 L. J. C. P. 196, 200.

(c) (1883), 8 App. Cas. 658, 670. Lord Blackburn, 673, Lord Watson: adopted by Farwell, L.J., in *Sadler v. Whiteman*, [1910] 1 K. B. 868, 890,

in construing a British statute of the year 1858." The case of *Aerated Bread Co. v. Gregg* (d), is not inconsistent with this opinion. That case turned on the meaning of the term "fancy bread" in section 4 of the Bread Act, 1836. Blackburn, J., said: "My opinion is that by the proviso the Legislature meant to except such bread as, at time the Legislature passed this Act, was sold under the denomination of 'French or fancy bread.'" But this opinion was not intended to accept as *contemporanea expositio* a mistaken idea as to what the words meant in 1836. In *Assheton Smith v. Owen* (e), Cozens-Hardy, L.J., said: "I do not think that the doctrine of *contemporanea expositio* can be applied in construing Acts which are comparatively modern," and the Court declined to apply the rule to the interpretation of local Acts of 1793 and 1800.

Legal as well as grammatical meaning to be ascertained.

4. We find it sometimes assumed that the real meaning of a statute may be arrived at by construing it according to its "grammatical" construction. Thus in *Att.-Gen. v. Lockwood* (f), Alderson, B., said: "The rule of law upon the construction of all statutes is to construe them according to the plain, literal, and grammatical meaning of the words." But besides the fact that "the language of statutes is not always that which a rigid grammarian would use" (g), it must be borne in mind that a statute consists of two parts, the letter and the sense. "It is not the words of the law," said Plowden, p. 465, "but the internal sense of it that makes the law, and our law (like all other) consists of two parts—viz., of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law—*quia ratio legis est anima legis*." Therefore, as Pollock, C.B., pointed out in *Waugh v. Middleton* (h), it is by no means clear that, "if it were laid down as a general rule that the grammatical construction of a clause shall prevail over its legal construction, a more certain rule would be arrived at than if it were laid down that its legal meaning shall prevail over its grammatical construction. In my opinion," continued Pollock, C.B., "grammatical and philological disputes (in fact, all that belongs to the history of language) are as obscure and lead to as many doubts and contentions as any question of law; and I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide. It must, however, be conceded that where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be,

(d) (1873), L. R. 8 Q. B. 355.

(e) [1906] 1 Ch. 179, 213.

(f) (1842), 9 M. & W. 378, 398.

(g) *Lyons v. Tucker* (1880), 6 Q. B. D. 660, 664, Grove, J.

(h) (1853), 8 Ex. 352, 356.

if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it." This rule was perhaps better stated by an Irish Judge, Burton, J., in *Warburton v. Loveland* (i), in terms quoted with approval by Lord Fitzgerald in *Bradlaugh v. Clarke* (k), viz., "I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statutes, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further." And substantially the same opinion is thus expressed by Lord Selborne: "The mere literal construction of a statute ought not to prevail if it is opposed to the intentions of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention can be better effectuated" (l).

The canon as to departure from the grammatical meaning was thus further stated by Lord Blackburn in *Caledonian Ry. v. North British Ry.* (m): "There is not much doubt about the general principle of construction. Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey v. Pearson* (n) in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted—at least in the Courts of law in Westminster Hall—that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further.' I agree in that completely, but in the cases in which there is a real difficulty this does not help us much, because the cases in which there is a real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words used with

(i) (1828), 1 Hud. & Bro. 632, 648. See also *Abbot v. Middleton* (1858) 7 H. L. C. 68, 115, Lord Wensleydale; *Thellusson v. Lord Rendlesham* (1858), 7 H. L. C. 519.

(k) (1883), 8 App. Cas. 354, 384.

(l) *Caledonian Ry. v. North British Ry.* (1881), 6 App. Cas. 114, 122. For an application of this canon to 24 & 25 Vict. c. 109, s. 21 (close time for salmon fishing; forfeiture of nets, etc.), see *Ruther v. Harris* (1875), 1 Ex. D. 97, 100, Grove, J., and *Att.-Gen. v. Beauchamp*, [1920] 1 K. B. 650.

(m) *Supra*. at p. 131.

(n) (1857), 6 H. L. C. 61, 106. Called the Golden Rule by Jervis, C.J., in *Mattison v. Hart* (1854), 14 C. B. 385; cf. *Swan v. Pure Ice Co.*, [1935] 2 K. B. 265, 274, Romer, L.J., ("lump sum" in s. 8 (3) (iii) of the Workmen's Compensation Act, 1925). See also *R. v. Banbury* (1834), 1 A. & E. 136, 142.

reference to the subject-matter is. To one mind it may appear that the most that can be said is that the sense may be what is contended by the other side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch or none at all. To another mind it may appear that the words are perfectly clear—that they can bear no other meaning at all, and that to substitute any other meaning would be not to interpret the words used, but to make an instrument for the parties—and that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which perhaps it would have been better to have avoided, but which we have no power to deal with.” In *Richards v. McBride* (o), Grove, J., said: “I even doubt whether, if there were words in the Act tending strongly the other way, I could pass from the plain grammatical construction of the phrase in question. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke, B., said in *Becke v. Smith* (p), advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity.” And in *The Duke of Buccleuch* (q), Lindley, L.J., put the rule thus: “You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the Legislature in this case, any more than in any other case, a meaning which would not carry out its object, but produce consequences which, to the ordinary intelligence, are absurd. You must give it such a meaning as will carry out its objects.”

The same canon of construction also applies to rules made by authority of the Legislature. So in *R. v. Dowling* (r), under the Judgments Act, 1838, an insolvent imprisoned for debt might be liberated either on his own petition or on that of any of his creditors. By the Bankruptcy Act, 1847, jurisdiction in insolvency was transferred to the County Courts and by section 10 of the Act provided that “if an insolvent petitions,” certain procedure was to be followed, but omitted all reference to the case where a creditor was the petitioner. It was held that the latter must have been intended to be included and, in order to avoid injustice, the words “if an insolvent petitions” were held to be an example of the general intention expressed by such a phrase as “if a petition be presented.” With reference to the rules for preventing collisions at sea, it was laid down in the Privy Council that “we must construe the rule (one made under statutory authority) as nearly as possible literally; we must construe it as strictly as it will

(o) (1881), 8 Q. B. D. 119, 123. Judges may agree that the meaning is plain but may differ as to what that plain meaning is—*Ellerman Lines v. Murray*, [1931] A. C. 126.

(p) (1836), 2 M. & W. 191, 195.

(q) (1889), 15 P. D. 86, 96.

(r) (1857), 8 E. & B. 605. Cf. *General Medical Council v. United Kingdom Dental Board*, [1936] Ch. 41, 48.

bear, so as not to lead to the absurdities which have been pointed out; short of that it must be construed to its full context" (s).

Manifest absurdity or futility, palpable injustice, or absurd inconvenience or anomaly to be avoided.

5. It is clear that "if," as Jervis, C.J., said in *Abley v. Dale* (t), "the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." And more recently Finnemore, J., said: "The mere fact that the results of a statute may be unjust or absurd does not entitle this Court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things" (u). In *Simms v. Registrar of Probates* (x), Lord Hobhouse, giving the advice of the Judicial Committee, said: "Where there are two meanings, each adequately satisfying the meaning (of a statute), and great harshness is produced by one of them, that has a legitimate influence in inclining the mind to the other . . . it is more probable that the Legislature should have used the word ('evade') in that interpretation which least offends our sense of justice" (y). In *R. v. Tonbridge Overseers* (z), Brett, L.J., said: "If the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all: there would be reason why you should not read it according to its ordinary grammatical meaning." Therefore, if a too literal adherence to the words of the enactment appears to produce an absurdity or an injustice, it will be the duty of a Court of construction to consider the state of the law at the time the Act was passed (a), with a view to ascertaining whether the language of the enactment is capable of any other fair interpretation (b), or whether it may not be desirable to put upon the language used a secondary (c) or restricted (d) meaning, or

(s) *The Fanny M. Carvill* (1875), 13 App. Cas. 455, n. (P. C.), approved in *The Glamorganshire* (1888), 13 App. Cas. 454 (H. L.).

(t) (1850), 20 L. J. C. P. 33, 35.

(u) *Holmes v. Bradfield R. D. C.*, [1949] 2 K. B. 1, at p. 7.

(x) [1900] A. C. 323, 335.

(y) *Cf. Capell v. Great Western Ry.* (1883), 11 Q. B. D. 345, 348, *per* Brett, M.R.

(z) (1884), 13 Q. B. D. 339, 342.

(a) *Gover's Case* (1875), 1 Ch. D. 182, 198, Brett, J.

(b) *River Wear Commissioners v. Adamson* (1876), 1 Q. B. D. 546, 549, Jessel, M.R.

(c) *Ex p. St. Sepulchre's* (1864), 33 L. J. Ch. 372, 375, Lord Westbury.

(d) In *Ex p. Walton* (1881), 17 Ch. D. 746, 757, Lush, L.J., said: "In order to prevent absurdity we must read the word 'surrendered' in a qualified sense." *Altrincham Electric Co. v. Sale U. D. C.* (1936), 34 L. G. R. 215.

perhaps to adopt a construction not quite strictly grammatical (e). But where the words of an Act of Parliament are plain the Court will not make any alteration in them because injustice may otherwise be done. "Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature" (f). And Viscount Simon in an appeal from India said: "Again and again this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used" (g). The question of absurdity has been the subject of comment in the Court of Appeal recently. Two cases similar in nature turned on the construction of Articles of Association of companies which allowed a retiring director to remain in office although failing to secure re-election by the shareholders. The matter is now largely covered by the Companies Act, 1948, Schedule I, Table A, Article 92. In *Batcheller v. Batcheller* (h), Romer, J., held that an article of a company permitting such a state of things was absurd, "A conclusion so extraordinary is repugnant to common sense . . . Articles of Association are for the use of business men and are not lightly to be construed if any other interpretation is fairly permissible in such a way as to lead to absurdity." This doctrine was adopted and followed by Wynn-Parry, J., in a very similar case, *Grundt v. Great Boulder Proprietary Gold Mines* (i). This case went to the Court of Appeal where *Batcheller v. Batcheller* (supra) was disapproved and not followed—Lord Greene, M.R., said (k): "Although the absurdity or the non-absurdity of one conclusion as compared with another may be of assistance and very often is of assistance to the Court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible on the question of an absurdity and in any event must not be applied so as to result in twisting language into a meaning which it cannot bear: it is a doctrine which must not be relied upon and must not be used to re-write the language in a way different from that in which it was originally framed." Cohen, L.J., was also not satisfied that the Article in question was an absurdity as there might be good reasons of business policy for its adoption. He said (l): "What may appear to one judge as sensible and legitimate may appear to some other judge or to the persons responsible for forming the company as neither sensible nor legitimate. I do not think that on a ground of that kind we are justified in disregarding what seems to me to be the plain meaning of the English

(e) *Williams v. Evans* (1876), 1 Ex. D. 277, 284, Field, J.

(f) *Warburton v. Loveland* (1831), 2 D. & Ch. (H. L.) 480, 489.

(g) *King Emperor v. Bensari Lal Sarma* (1945), L. R. 72 I. A. 57, 70.

(h) [1945] Ch. 169, 177.

(i) [1947] 2 A. E. R. 439.

(k) [1948] Ch. 145, at p. 159.

(l) *Ibid.* at p. 155.

language even though in a particular case it does appear to produce an inequitable result." "The general rule," said Willes, J., in *Christopherson v. Lotinga* (m), "is stated by Lord Wensleydale in these terms—viz., 'to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.' I certainly," continued Willes, J., "subscribe to every word of the rule, except the word 'absurdity,' unless that be considered as used there in the same sense as 'repugnance'; that is to say, something which would be so absurd with reference to the other words of the statute as to amount to a repugnance" (n). This rule was thus expressed by Jessel, M.R. (o): "Any one who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things—either that there is some other section which cuts down its meaning, or else that the section itself (if read literally) is repugnant to the general purview of the Act." 6 Geo. 3, c. 53, s. 1, gave a form of oath which it was required should be taken by certain persons. The form of oath contained the name of King George III, and made no provision for the necessary alteration in the name of the sovereign at his death. It was argued in *Miller v. Salomons* (p), that as the form of the oath mentioned the name of King George only, the obligation to administer it ceased with the reign of that sovereign, because it was applicable to no other than to him. "I think," said Parke, B., in his judgment, "this argument cannot prevail. It is clear that the Legislature meant the oath to be taken always thereafter, and as it could not be taken in those words during the reign of a sovereign not of the name of George, it follows that the name George is merely used by way of designating the existing sovereign, and the oath must be altered from time to time in the name of the sovereign. This is an instance in which the language of the Legislature must be modified, in order to avoid absurdity and inconsistency with its manifest intentions" (q).

The argument from inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are alternative methods of construction. Lord Birkenhead said in *Sutters v. Briggs* (r): "The consequences of this view [of section 2 of the Gaming Act, 1835] will no doubt be extremely inconvenient to many persons. But this is not a matter

(m) (1864), 33 L. J. C. P. 121, 123.

(n) See hereon *Tasmania v. Commonwealth* (1904), 1 Australia C. L. R. 329, 346, Barton, J.

(o) *North v. Tamplin* (1881), 8 Q. B. D. 247, 253.

(p) (1852), 7 Ex. 475, 553.

(q) Cf. *R. v. Everdon* (1807), 9 East 101, where the question raised was whether "bringing" a pauper before a justice with a view to removal meant bringing him physically there.

(r) [1922] A. C. 1, 8.

proper to influence the House unless in a doubtful case affording foothold for balanced speculation as to the probable intention of the Legislature." In *Re Robbs' Contract* (s) Lord Greene, M.R., said: "The inconvenience of the conclusion to which I have come from the point of view of business with bankers and so forth . . . is obvious. . . . The Court cannot allow the existence of that circular to affect its mind in deciding what is the true construction of the section, [section 74 (2) and (6) Finance (1909-10) Act, 1910]"; and Clauson, L.J., said he had made strenuous efforts to avoid the same conclusion "because I am conscious of the great inconvenience which this decision probably will cause." And in *De Keyser v. British Railway Traffic and Electric Co.* (t), a vehicle liable to forfeiture under section 202 of the Customs Consolidation Act, 1876, could not be released on the ground of hardship on an innocent owner.

Where the language is explicit, its consequences are for Parliament, and not for the Courts, to consider. In such a case the suffering citizen must appeal for relief to the lawgiver and not to the lawyer (u). The rule is thus laid down by Cotton, L.J., in *Reid v. Reid* (x): "In considering the true construction of an Act, I am not so much affected as some Judges are by consequences which may arise from different constructions. Of course, if the words are *ambiguous*, and one construction leads to *enormous* inconvenience, and another construction does not, the one which leads to least inconvenience is to be preferred." The Courts will not lightly impugn the wisdom of the Legislature, and if any alternative construction, although not the most obvious, will give a reasonable meaning to the Act and obviate the absurdities or inconveniences of an absolutely literal construction, the Courts deem themselves free to adopt it. This view was thus stated by Lord Esher, M.R., in *R. v. Commissioners under the Boiler Explosions Act*, 1882 (y): "It is said that it is very inconvenient that the Board of Trade should have jurisdiction [under the Boiler Explosions Act, 1882], because it is not denied that the Home Secretary has jurisdiction under the Mines Regulation Act. The inconvenience is manifest in my opinion, and, if I could have done so properly, I should have been very willing to hold that the sole jurisdiction was in the Home Secretary; but if any mistake has been made, it is not the province of the Court to legislate so as to cure defects." And in *Re Low* (z), the same Judge, speaking of section 125 (10) of the Bankruptcy Act, 1883, said: "The only difficulty suggested in following the words of the section is, that if they are taken literally in a case where there are two notices, one in respect of each judgment debt, the debtor might pay on one, and so no bankruptcy petition could be presented. I do not think that is a

(s) [1941] Ch. 463, 478.

(t) [1936] 1 K. B. 224.

(u) Cf. *Garland v. Carlisle* (1837), 4 Cl. & F. 693, 705, Coleridge, J.

(x) (1886), 31 Ch. D. 402, 407.

(y) [1891] 1 Q. B. 703, 716.

(z) [1891] 1 Q. B. 147, 148.

sufficient reason for reading the words of the section otherwise than as they are written." But in *R. v. Cumberland Justices* (a), the Court held it necessary to limit the meaning of "premises" in section 45 of the Licensing Act, 1872 (b), to premises for which an "on" licence is sought, in order to put a reasonable construction on the Act, and to obviate the necessity of holding that an Act passed to regulate "on" licenses repealed 3 & 4 Vict. c. 61, which related wholly to "off" licences.

Limitations on judicial modification of language of an Act.

6. It is not, however, competent to a Judge to modify the language of an Act of Parliament in order to bring it into accordance with his own views as to what is right or reasonable. *Boni judicis est dicere, non jus dare*. In *Abel v. Lee* (c), the question was, what was the proper construction to be put upon section 3 (4) of the Representation of the People Act, 1867, which enacts that any man is entitled to be registered as a voter who, on or before July 20, has paid "all poor rates that have become payable by him up to the preceding fifth day of January." It appeared that the person in question had paid all the rates of the current year, but had been excused, on account of poverty, from paying a rate that had been payable in the preceding year. The question therefore was, Did the expression "all poor rates that have become payable" include the rate he had been excused or not? It was argued, that if these words were construed in their ordinary and strictly grammatical meaning, so as to include *all* past rates, this absurdity might follow, that the claimant would lose his franchise forever unless he paid up this old rate which he had been excused, and that therefore the language of the Act ought to be modified, and the words construed in a restricted sense. This argument, however, did not prevail. "No doubt," said Willes, J. (d), "the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy, or injustice. . . . But I utterly repudiate the notion that it is competent to a Judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable."

An extreme instance of the application of this rule is to be found in *Young & Co. v. Mayor, etc., of Leamington* (e). Section 174 of the Public Health Act, 1875, requires contracts entered into by a sanitary authority for a sum over £50 to be under seal. The plaintiff executed works approved by the defendants under the supervision of their engineer, and under a contract in writing with the engineer which was not sealed by the corporation. The Court of Appeal decided

(a) (1881), 8 Q. B. D. 369.

(b) Re-enacted as s. 37 of the Licensing (Consolidation) Act, 1910.

(c) (1871), L. R. 6 C. P. 365.

(d) *Ib.* p. 371.

(e) (1882), 8 Q. B. D. 579; (1883), 8 App. Cas. 517.

that the defendants were not bound by the contract, although they had had the benefit of it, on the ground that to hold otherwise would be to repeal the enactment. "It may be," said Lindley, L.J. (f), "that this is a hard and narrow view of the law; but my answer is, that Parliament has thought it expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship." This case also decided that there can be no waiver of compliance with statutory provisions enacted in the public interest, nor estoppel against setting up non-compliance with them, when the provisions relate to the form of contracts between individuals and public bodies created by or under a statute (g).

In *R. v. Mansel Jones (h)*, Lord Coleridge C. J. said that it was the business of the Courts to see what Parliament had said, instead of reading into an Act what ought to have been said. This involves the assumption that the Act in question is intelligible (i). But the consequences of any other mode of construction would be to defeat the purposes of the Legislature. And in *Latham v. Lafone (k)*, Martin, B., said: "I think the proper rule for construing this statute is to adhere to its words strictly; and it is my strong belief that, by reasoning on long-drawn inferences and remote consequences, the Courts have pronounced many judgments affecting debts and actions in a manner that the persons who originated and prepared the Act never dreamed of" (l). And in *Coxhead v. Mullis (m)*, Lord Coleridge, C.J., said: "The tendency of my own mind . . . always is to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament by considerations of policy, if it be policy, as to which minds may differ and as to which decisions may vary." The object and policy of an Act are, however, often the basis of interpretation, (see *post*, Part I, ch. v.)

Legislature assumed to have used the clearest way of expressing its intention.

7. With regard to what is meant by the expression, "the plain meaning of the words of a statute," it is necessary on all occasions, to give the Legislature credit for employing those words which will express its meaning more clearly than any other words; so that if in any particular instance it can be shown that there are two expressions which might have been used to convey a certain intention, but one

(f) (1882), 8 Q. B. D. at p. 585.

(g) See also *Melliss v. Shirley Local Board* (1885), 16 Q. B. D. 446, and p. 60 *ante*.

(h) (1889), 23 Q. B. D. 29, 32.

(i) See 6 L. Q. R. 118.

(k) (1867), L. R. 2 Ex. 115, 121.

(l) *Valentini v. Canali* (1889), 24 Q. B. D. 166, 167, Lord Coleridge, C.J.: "No doubt the words of the Infants Relief Act, 1874, are strong and general: but a reasonable construction ought to be put upon them. . . . When an infant has paid for something and consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid."

(m) (1878), 3 C. P. D. 439, 442.

of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the Legislature uses that one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all, and in that event it becomes necessary to try to discover what intention it did intend to convey. "In endeavouring," said Pollock, C.B., in *Att.-Gen. v. Sillem* (n), "to discover the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; 2nd, the words or expressions which obviously are by design omitted; 3rd, the connection of the clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If this comparison of one clause with the rest of the statute makes a certain proposition clear and, undoubted, the Act must be construed accordingly, and ought to be so construed as to make it a consistent and harmonious whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." In that case it was contended on the part of the prosecution that 59 Geo. 3, c. 69, s. 7, was meant to put ships constructed for war upon a footing different from any other munitions of war; to leave cannon, arms, and gunpowder to be freely supplied to belligerent Powers, but to prevent ships of a warlike character from being furnished to them. "If this had been the object of our Legislature," said Pollock, C.B. (o), "it might have been accomplished by the simplest possible piece of legislation; it might have been expressed in language so clear that no human being could entertain a doubt about it, instead of the awkward, difficult, and doubtful clause which it is admitted on the part of the prosecution we have to deal with." In *Waugh v. Middleton* (p), the Court said: "We are of opinion that we are not compelled to read the word 'now' in the sense of 'heretofore.' A very strong reason for holding that the Legislature has not used the word 'now' in that sense is that, if the Legislature intended so to use it, expressions would have been adopted which would have left no possible doubt as to what was intended" (q).

(n) (1863), 2 H. & C. 431, 515.

(o) *L. c.*, p. 526.

(p) (1853), 8 Ex. 352, 358.

(q) See also *Dover Gaslight Co. v. Mayor, etc., of Dover* (1855), 1 Jur. (N.S.) 813.

CHAPTER II

RULES FOR CONSTRUCTION WHERE THE MEANING
IS NOT PLAIN

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Mode of ascertaining meaning if obscure.

1. If the language of an Act of Parliament is clear and explicit, it must, as already stated (*a*), receive full effect, whatever may be the consequences. Of many Acts, however, it can fairly be said, as was said by Lord Herschell (*b*) of the Building Societies Act, 1884, that no construction "is free from difficulty, and no construction carries out a clear, defined and well-indicated policy on the part of the Legislature" (*c*). If (as is often the case) the meaning of an enactment, whether from the phraseology used (*d*) or otherwise, is obscure, or if the enactment is, as Brett, L.J., said in *The R. L. Alston* (*e*), "unfortunately expressed in such language that it leaves it quite as much open, with regard to its form of expression, to the one interpretation as to the other," the question arises, "What is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction." And if it appears that one of these constructions will do injustice, and the other will avoid that injustice, "it is the bounden duty of the Court to adopt

(*a*) See pp. 64, 65 *ante*; and see Wilberforce, pp. 2, 3.

(*b*) *Western Suburban, etc., Building Socy. v. Martin* (1885), 17 Q. B. D. 609, 615.

(*c*) For other examples of obscure statutes, see *Winter v. Att.-Gen. of Victoria* (1875), L. R. 6 P. C. 378, where the Judicial Committee described the Land Act, 1869 (No. 360), s. 98, of the Colony of Victoria as "not merely ambiguous, but, according to the literal meaning of its language, insensible." In *Cocker v. Cardwell* (1869), L. R. 5 Q. B. 15, 17, Cockburn, C.J., stigmatised the drafting of the Nuisance Removal Acts (18 & 19 Vict. c. 121 and 23 & 24 Vict. c. 77), therein cited, as "one of the most remarkable specimens of legislative incuria of the many which are daily brought before us. . . It would appear that the draftsman of the last Act must have forgotten that in the former Act there was power given not only to the local authority but to an inhabitant to initiate proceedings." Sir James Stephen, in his Digest of the Criminal Law (1st edit.), points out several obscurely worded statutes.

(*d*) As to the phraseology employed being the cause of many questions which arise as to the meaning of statutes, Coke says (preface to Part II of his Reports):—"Neque enim (ut quod res est dicam) difficiles propemodum ac spinosæ questiones ex principiis juris oriuntur sed . . . nonnunquam ex ipsis comitiorum institutis cautionum atque additionum mole onustis, et vel in pulvere ac festinatione conscriptis, vel a sciolo quopiam in hoc genere correctis et emendatis."

(*e*) (1883), 8 P. D. 5, 9 (clause 22, Bye-laws of River Thames).

the second, and not to adopt the first, of those constructions" (f). However "difficult, not to say impossible," it may be to put a perfectly logical construction upon a statute, a Court of justice "is bound to construe it, and, as far as it can, to make it available for carrying out the objects of the Legislature, and for doing justice between parties" (g). This rule is not peculiar to English law, and is equally applicable to Scottish and colonial statutes (h).

Sense to be made if possible. The first business of the Courts is to make sense of the ambiguous language (i), and not to treat it as unmeaning, it being a cardinal rule of construction that a statute is not to be treated as void, however oracular. This was thus laid down by Bowen, L.J., in *Curtis v. Stovin* (k): "The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule—viz., that, if possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*." And Fry, L.J., added (l): "The only alternative construction offered to us would lead to this result—that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect." In the particular case the Court had to deal with section 65 of the County Courts Act, 1888, empowering the parties to apply at chambers for an order "that an action not exceeding £100 to be tried in any Court in which the action might have been commenced." By section 56 the limit of a county court's jurisdiction was £50 (m). If these words had been taken literally, the section would have been ineffectual, for, *ex hypothesi*, the actions in question could not be commenced in the county court. Lord Esher (n) said: "The words mean 'in any court in which if it had been a county court action, the action might have

(f) *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448, 456, Lord Cairns.

(g) *Phillips v. Phillips* (1866), L. R. 1 P. & D. 169, 173, Sir James Wilde. In *Freme v. Clement* (1881), L. R. 18 Ch. D. 499, 508, Jessel, M.R., expressed the same idea in the following words:—"We ought to adopt that interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied."

(h) It has been so applied in *Railton v. Wood* (1890), 15 App. Cas. 363; and *Heritable Reversionary Co. v. Millar*, [1892] A. C. 598, 623, Lord Field.

(i) *Re Gilligan*, [1950] P. 32, 38. "If these last words are ambiguous . . . it is right that consideration should be given to the whole purpose of the section and such interpretation given to the potentially ambiguous words as shall carry out the intentions of the Legislature if these can be ascertained"—Pilcher, J., with regard to the words "next of kin under the Statute of Distributions" in s. 18 of the Wills Act, 1837. Cf. *per* Denning, L.J., in *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K. B. 481 at p. 498 quoted at p. 23 *supra*.

(k) (1889), 22 Q. B. D. 512, 517.

(l) *Ib.*, p. 519.

(m) In the same section is used the Hibernicism, "convenient thereto," which embarrassed the Judges in *Burkill v. Thomas*, [1892] 1 Q. B. 99.

(n) *Ib.* p. 517.

been commenced.' The Legislature have misdescribed the court to which the transfer is to be made, but at the same time they have misdescribed it in such a way as to show that there is a misdescription of the court."

Rules in *Heydon's Case*.

2. The most firmly established rules for construing an obscure enactment are those laid down by the Barons of the Exchequer in *Heydon's Case* (o), which have been continually cited with approval (p) and acted upon, and are as follows:—"That for the sure and true interpretation of all statutes in general (be they penal (q) or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. (4) The true reason of the remedy. And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*." These rules are still in full force and effect, with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof. "In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case*, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief" (r). "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order properly to interpret the statute in question" (s). A good illustration of the way in which these rules are applied is to be found in *Salkeld v. Johnson* (t), where the question was whether, under the Tithe Act, 1832, a valid and indefeasible claim of exemption from

(o) (1584), 3 Co. Rep. 8. See 1 Bl. Com. ed. Hargrave, p. 87, n. 38.

(p) E.g., in *Miller v. Salomons* (1852), 7 Ex. 475; *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431; *R. v. Castro* (1874), L. R. 9 Q. B. 350; *Davies v. Kennedy* (1869), Ir. R. 3 Eq. 668, 693. *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 764. *The Solio Case*, [1898] A. C. 571, 573, Lord Halsbury, L.C.

(q) In *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431, 509, Pollock, C.B., held that "penal," in *Heydon's Case*, meant creating a disability or forfeiture. As to the rules for construing penal statutes, see Part III, chap. i., *post*.

(r) *Re Mayfair Property Co.*, [1898] 2 Ch. 28, 35, Lindley, M.R.

(s) *Macmillan v. Dent*, [1907] 1 Ch. 114, 120, Fletcher Moulton, L.J., Cf. *Clare v. Joseph* [1907] 2 K. B. 372, 378; *Conway v. Wade*, [1909] A. C. 506, 511.

(t) (1848), 2 Ex. 256, 272.

payment of tithes could be sustained for lands which have never paid tithes for sixty years. "This question depends," said the Court, "upon the construction of this Act, which unfortunately has been so penned as to give rise to a remarkable difference of opinion among the Judges. . . . We propose to construe the Act, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only to modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider (1) the state of the law which it proposes or purports to alter; (2) the mischief which existed, and which it was intended to remedy; and (3) the nature of the remedy provided, and then to look at the statutes *in pari materia* as a means of explaining this statute. These are the proper modes of ascertaining the intention of the Legislature."

In *Young & Co. v. Mayor, etc., of Leamington (u)*, Lord Blackburn said that the Courts "ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law." From this assumption springs the practice of the Courts to examine the pre-existing law in order to clear up any doubt as to the meaning of an Act. Such an examination was made by Lord Blackburn, in the case last cited, to assist him to the conclusion that section 174 of the Public Health Act, 1875, was intended to get rid of the doubts raised by judicial decisions whether certain corporations could contract otherwise than under their common seal. This was the regular practice of that very learned Judge in all cases in which any doubt arose in his mind, whether they arose upon the construction of an English (x) or a colonial (y) statute, and it is generally recognised as a proper method of ascertaining the true meaning of an enactment (z).

A similar course was followed by Lord Birkenhead sitting on the Committee of Privileges to examine Lady Rhondda's claim (a), to be summoned to the House of Lords. The legal history of the matter to show that a peeress had no right at common law to a summons was referred to expressly to aid the interpretation of the Sex Disqualification (Removal) Act, 1919. He quoted the authority of *Stradling v. Morgan (b)*, as authorising this method of construction. The legal history of a statute has also been examined by Lord Halsbury in *Eastman Photographic Co. v. Comptroller-General of Patents (c)*, and by Lord Atkin and Lord Macmillan in *Avery v. L. & N. E. Ry. (d)*. This

(u) (1883), 8 App. Cas. 517, 526.

(x) *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, 373, 375.

(y) *Carter v. Molson* (1883), 8 App. Cas. 530, 536, 541.

(z) Cf. *Yorkshire Fire & Life Insurance Co. v. Clayton* (1881), 8 Q. B. D. 421, 426, Brett, L.J.

(a) *The Claim of the Viscountess Rhondda*, [1922] 2 A. C. 339.

(b) (1560), 1 Plowden 209 and cf. Turner, L.J., in *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 22.

(c) [1898] A. C. 571, 575.

(d) [1938] A. C. 606, 612, 617.

method was also adopted by Lord Simon, L.C., in *London Brick Co. Ltd. v. Robinson (e)*.

Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate (*f*).

Exposition ex visceribus actus.

3. But besides the rules laid down in *Heydon's Case* (*ante*, p. 91) for the exposition of obscurely penned statutes, there is a general rule of construction applicable to all statutes alike, which is spoken of as construction *ex visceribus actus* (*g*)—within the four corners of the Act. "The office of a good expositor of an Act of Parliament," said Coke in the *Lincoln College Case* (*h*), "is to make construction on all parts together, and not of one part only by itself—*Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit*." And again, in 1 Inst. 381 *b*, he says: "It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers . . . and this exposition is *ex visceribus actus*." But this rule of construction is never allowed to alter the meaning of what is of itself clear and explicit (*i*); it is only when, as the Court said in *Palmer's Case* (*k*), "any part of an Act of Parliament is penned obscurely and when other passages can elucidate that obscurity, that recourse ought to be had to such context for that purpose"; for, as the Judges said in the House of Lords in *Warburton v. Loveland* (*l*), "no rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part" (*m*). "It is

(*e*) [1943] A. C. 341, 344 ff. Cf. *post* p. 120.

(*f*) *Shannon Realities, Ltd. v. Ville de St. Michael*, [1924] A. C. 185, at p. 192. *I. T. C. v. Gibbs*, [1942] A. C. 402, 414, Lord Simon, L.C.

(*g*) Sir Roundell Palmer, in a speech on the Collier appointment, *ante*, p. 76, note (*i*) (Feb. 1872), well expounded the meaning of "construction *ex visceribus actus*." He then said as follows: "Nothing is better settled than that a statute is to be expounded, not according to the letter, but according to the meaning and spirit of it. What is within the true meaning and spirit of the statute is as much law as what is within the very letter of it, and that which is not within the meaning and spirit, though it seems to be within the letter, is not the law, and is not the statute. That effect should be given to the object, spirit, and meaning of a statute is a rule of legal construction, but the object, spirit, and meaning must be collected from the words used in the statute. It must be such an intention as the Legislature has used fit words to express." See 209 Hansard, Parl. Deb. (3rd series), 685.

(*h*) (1595), 3 Co. Rep. 59 b. Cf. *Re a Debtor*, [1950] Ch. 423, 431, *per* Evershed, M.R.

(*i*) In *Bentley v. Rotherham* (1876), 4 Ch. D. 588, 592, Jessel, M.R., put it in this way: "There is no doubt a rule, applicable to Acts of Parliament as well as to other legal instruments, that you may control the plainest words by reference to the context. But then, as has been said very often, you must have a context even more plain, or at least as plain as the words to be controlled."

(*k*) (1784), 1 Leach C. C. (4th edit.) 355.

(*l*) (1831), 2 D. & Cl. 489, 500.

(*m*) Adopted in *Tasmania v. Commonwealth* (1904), 1 Australia C. L. R. 329, 357, Barton, J.

not the duty of a Court of law," said Selwyn, L.J., in *Smith's Case* (n), "to be astute to find out ways in which the object of an Act of the Legislature may be defeated."

This rule of construction has frequently been recognised and acted upon by Courts of law from Coke's time down to the present day. In *Brett v. Brett* (o), Sir John Nicholl, M.R., said as follows: "The key to the opening of every law is the reason and spirit of the law; it is the *animus imponentis*, the intention of the law-maker expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, the particular phrase is not to be viewed detached from its context in the statute; it is to be viewed in connection with its whole context, meaning by this as well the title and preamble as the purview or enacting part of the statute." In *Bywater v. Brandling* (p), Lord Tenterden said: "In construing Acts of Parliament we are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act. And if we find in the preamble or in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause." In *R. v. Mallow Union Guardians* (q), the question was whether the Common Lodging House Acts of 1851 and 1853 applied to Ireland. "*Prima facie*," said Lefroy, C.J., "since the Union every Act applies to Ireland, but according to Lord Coke the construction of a statute is best made *ex visceribus actus*, and, on looking carefully through the details of these Acts, I think abundant proof will be found of their inapplicability to Ireland" (r). In *Ex p. St. Sepulchre's* (s), Lord Westbury said: "The Vice-Chancellor has taken these words apart from the context. . . . He is of opinion that what he denominates the abstract justice of the case requires this interpretation. I cannot concur in that reasoning. I cannot admit the principle that in a matter of positive law abstract justice requires or justifies any departure from the established rules of interpretation." In *Rein v. Lane* (t), Blackburn, J., said: "It is, I apprehend, in accordance with the general rule of construction that you are not only to look at the words, but you are to look at the context, the collocation (u),

(n) (1869), L. R. 4 Ch. App. 611, 614.

(o) (1826), 3 Addams 210, 216.

(p) (1828), 7 B. & C. 643, 660.

(q) (1860), 12 Ir. C. L. R. 35, 40.

(r) A definition in 23 & 24 Vict. c. 26, passed to get rid of this decision, has been held to govern the meaning in England of the term "lodging-house," which is not defined in the Acts of 1851 and 1853; *Parker v. Talbot*, [1905] 2 Ch. 643. "A common lodging-house means a house where persons are lodged for hire."

(s) (1864), 33 L. J. Ch. 372, 375.

(t) (1867), L. R. 2 Q. B. 144, 151.

(u) In *R. v. Ramsgate* (1827), 6 B. & C. 712, 717, Holroyd, J., said that the words there in question "must be construed, according to their nature and import, in the order in which they stand in the Act of Parliament."

and the object of such words relating to such matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances " (x).

In *Colquhoun v. Brooks* (y), Lord Herschell said: " It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light on the intention of the Legislature, and which may serve to show that the particular provision ought not to be construed as it would be alone and apart from the rest of the Act." And Lord Davey in *Canada Sugar Refining Co. v. R.* (z), said: " Every clause of a statute should be construed with references to the context and other clauses in the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

And in *Mersey Docks, etc., Board v. Henderson* (a) Lord Halsbury. L.C., said: " It certainly is not a satisfactory method of arriving at the meaning of a compound phrase to sever it into several parts, and to construe it by the separate meaning of each of such parts when severed. Many examples will occur to the mind where such a process would lead to absurdity."

Statutory definitions. It follows from the rule thus variously stated that all statutory definitions or abbreviations must be read subject to the qualification, variously expressed, in the definition clauses which create them, such as: " unless the context otherwise requires "; or " unless a contrary intention appears "; or " if not inconsistent with the context or subject-matter " (b).

Construction by the equity of a statute.

4. There was also another mode of construction used to extend a remedial statute called proceeding upon " the equity of the statute " (c), which as Lord Westbury said in *Hay v. Lord Provost of Perth* (d), was " very common with regard to our earlier statutes, and very consistent with the principle and manner according to which Acts of Parliament were at that time framed." This mode of construction was explained (e) by Coke in 1 Inst. 24 b. " ' Equity,' " said he, " is

(x) Hence the rule laid down by Lord Coke (2 Inst. 386), " that a case, out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, though it be within the words." Quoted and acted upon by Abbot, C.J., in *Doe d. Nethercote v. Bartle* (1822), 5 B. & Ald. 492, 501.

(y) (1889), 14 App. Cas. 493, 506.

(z) [1898] A. C. 735, 741.

(a) (1888), 13 App. Cas. 595, 599. Cf. *Leader v. Duffey* (1888), 13 App. Cas. 294, 301, Lord Halsbury: *North Eastern Ry. v. Hastings*, [1900] A. C. 260, 269, Lord Davey: *Att.-Gen. v. Milne*, [1914] A. C. 765.

(b) See *Strathern v. Padden*, [1926] S. C. (J.) 9.

(c) On this subject, see *Pennsylvania University Law Review*, vol. 58, p. 76.

(d) (1863), 4 Macq. H. L. (Sc.) 535, 544.

(e) *Qui hæret in litera hæret in cortice*, 1 Co. Inst. 546. See also 3 Co. Rep. 31; 5 ib. 99. Perhaps the fullest dissertation on the subject is to be found in a note at the end of *Eyston v. Studd* (1574), 2 Plowden 463, where it is said: "As a nut

a construction made by the Judges, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in express terms" (f).

This mode of interpretation has at the present day practically fallen out of use in Courts of law in England (g). In *Edwards v. Edwards Mellish*, L.J., said: "The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament, but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal principles" (h). But in *Russell v. Meyrick* (i), it was necessary to construe estate Acts of 1535 and 1863, affecting the Broke Estates; and Cozens-Hardy, L.J., said: "The Statute of Uses, which was enacted in the same year as the Broke Estates Act (1535), contained provisions to the effect that a wife for whom a jointure should be provided could not also claim dower. It was held in *Vernon's Case* (k), that a devise of land to a wife is a jointure within the Statute of Uses. 'Although land was not devisable until 32 Hen. 8 (c. 1), yet it is frequent in our books that an Act made of late time shall be taken within the equity of an Act made long time before.' This seems to justify the conclusion that a jointure under the power conferred by the Broke Estates Act upon tenants in tail may be well created by a testamentary instrument."

At the present time "much more weight," as Lord Blackburn said in *Bradlaugh v. Clarke* (l), "is given to the natural meaning of the words than was done in the time of Elizabeth." "I cannot forbear observing," said Lord Tenterden in *Brandling v. Barrington* (m), "that I think there is always danger in giving effect to what is called the equity of the statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them." In *Att.-Gen. v. Sillem* (n), Bramwell, B., said: "I must here record the well-founded remark of the Attorney-General to the effect,

consists of a shell and a kernel so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut so the sense is the fruit of the statute." See also Viner's *Abr. Statutes*, E. 6; Com. Dig. tit. Parliament, R. 10; *Wedderburn v. Duke of Atholl*, [1900] A. C. 403, 419, and p. 70 *ante*.

(f) In *Greaves v. Tofield* (1880), 14 Ch. D. 563, 578, Bramwell, L.J., said that a good many of the doctrines of Courts of equity seemed to him to be "the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases."

(g) Sedgwick, p. 311, endeavours to prove that statutes are still construed in England "by the equity." At p. 258, *n.*, it is said that *Edwards v. Dick* (1821). 4 B. & Ald. 212, "seems to be decided on the equity of the particular case."

(h) (1876), 2 Ch. D. 291, 297.

(i) [1903] 2 Ch. 461. Cf. Lord Halsbury, L.C., in *J. T. C. v. Pemsel* (1891), A.C. 531 at p. 542. *Shuttleworth v. Fleming* (1865), 19 C. B. (N.s.) 687 at p. 703, Byles, J.

(k) (1572), 4 Co. Rep. 1 a.

(l) (1883), 8 App. Cas. 354, 373.

(m) (1827), 6 B. & C. 467, 475.

(n) (1863) 2 H. & C. 431, 532.

that whereas formerly statutes, being extended equitably, as it was called, beyond their natural meaning, penal statutes were exempt from such extension; now that such liberties are not taken with statutes, there is no reason for construing penal statutes on such different principles as were formerly applied."

But although the expression "equity of the statute" is not now favoured by the Courts, we find that a somewhat similar principle of construction is sometimes acted upon (o), and that if it is manifest that the principles of justice require something to be done which is not expressly provided for in an Act of Parliament, a Court of justice will take into consideration the spirit and meaning of the Act apart from the words; in other words, there is still, as Jessel, M.R., said, in *Re Bethlem Hospital* (p), "such a thing as construing an Act according to its intent, though not according to its words." For instance in *Barber v. Pigden* (q), Scott, L.J., considering the provisions of the Law Reform (Married Women and Tortfeasors) Act of 1935, thought the intention of the Legislature was "to make a clean sweep of the old common law fiction" of the merging of married women's property in their husbands.

The question has often arisen in the Courts whether statutes prescribing notice of action as a condition precedent to a right to recover apply in the case where an injunction is sought to restrain the commission of some imminent breach of the law by the person entitled to notice, and it has been held that application for an injunction (when that is the substantial part of the claim) is not prevented by a notice of action clause (r). For, as Bowen, L.J., said in *Chapman Morsons & Co. v. Auckland Guardians* (s): "It is obvious that if such a section (requiring notice of action) were allowed to paralyse the operation of the remedy by injunction, a man would have to sit still while his property was threatened with manifest, immediate, and in many cases it might be irreparable, injury."

The effect of this is in one sense to supply the equity of the statute; but in truth no more is done than to construe the statute according to its plain language, though the effect of the construction is incidentally and equitably to deny to local authorities an overriding privilege, such as would exempt them from all forms of injunction.

This application of the rule of construction now under consideration is now of less importance than formerly, as the Public Authorities Protection Act, 1893 (t), repeals so much of any public general Act as

(o) Sedgwick, p. 250, this question is discussed in a chapter entitled "Strict and Liberal Construction." But (as is pointed out p. 10 *ante*, and in Part III, chap. i. on "Penal Statutes," *post*) all statutes, whatever may be the subject of them, are now construed according to the same rules, so that the question of "strict or liberal construction" does not now arise in the same way as formerly.

(p) (1875), L. R. 19 Eq. 457, 459.

(q) [1937] 1 K. B. 664, 677.

(r) *Att.-Gen. v. Hackney Local Board* (1875), L. R. 20 Eq. 626; *Flower v. Low Leyton L. B.* (1877), 5 Ch. D. 347.

(s) (1889), 23 Q. B. D. 294, 303.

(t) 56 & 57 Vict. c. 61.

enacted that in any proceeding to which that Act applies notice of action was to be given.

Construction ut res magis valeat quam pereat.

5. "It is a good general rule in jurisprudence," said the Judicial Committee in *Ditcher v. Denison* (u), "that one who reads a legal document whether public or private, should not be prompt to ascribe—should not, without necessity or some sound reason, impute—to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use" (x). And this is as justly and even more tersely put by Lord Bramwell, who said, in *Cowper-Essex v. Acton L. B.* (y): "The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity." "It may not always be possible," said Jessel, M.R., in *Yorkshire etc. Insurance Co. v. Clayton* (z), "to give a meaning to every word used in an Act of Parliament," and many instances may be found of provisions put into statutes merely by way of precaution. "Nor is surplusage, or even tautology, wholly unknown in the language of the Legislature. It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption" (a). "Such specific exemptions are often introduced *ex majori cautela* to quiet the fears of those whose interests are engaged or sympathies aroused in favour of some particular institution, and who are apprehensive that it may not be held to fall within a general exemption" (b). In *Re Bank of London* (c), Lord Hatherley said: "I do not attach much importance to the exception of insurance companies in section 27 of 20 & 21 Vict. c. 14. I think it is mere surplusage, and unfortunately such surplusage is not uncommon in Acts of Parliament." Nevertheless, as Lord Brougham said in *Auchterarder Presbytery v. Lord Kinnoull* (d), "a statute is never supposed to use words without a meaning." Therefore, if the language used in a statute is ambiguous and capable of two constructions, the rule as enunciated by the Judicial Committee in *Cargo ex Argos* (e), is "to adopt that construction which will give some effect to the words rather than that which will give none."

Very recently (f) the House of Lords had occasion to construe

(u) (1857), 11 Moore P. C. 325, 337.

(x) Dwaris, p. 568, puts the rule thus: "The rule is to adopt such an interpretation, *ut res magis valeat quam pereat*." "It is," said James, L.J., in *Re Florence Land Co.* (1878), 10 Ch. D. 530, 544, "a cardinal rule of construction that all documents are to be construed *ut res magis valeat quam pereat*". *Vide* p. 67 ante.

(y) (1889), 14 App. Cas. 153, 169.

(z) (1881), 8 Q. B. D. 421, 424.

(a) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 532, 589, Lord Macnaghten.

(b) *Ib.* p. 574, Lord Herschell. See also *Fryer v. Morland* (1876), 3 Ch. D. 675, 685, Jessel, M.R.; *Hough v. Windus* (1883), 12 Q. B. D. 224, 232, Brett, M.R.

(c) (1871), L. R. 6 Ch. App. 421, 426.

(d) (1839), 6 Cl. & F. 646, at p. 686.

(e) (1873), L. R. 5 P. C. 134, 153.

(f) *Hill v. William Hill (Park Lane) Ltd.*, [1949] A. C. 530, at p. 546.

section 18 of the Gaming Act, 1845, (g), and overruled by a majority the decision of the Court of Appeal in the well-known case of *Hyams v. Stuart-King* (h). It was argued that the two branches of the section in fact meant the same thing. Viscount Simon said: "It is to be observed that though a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in an Act of Parliament is not to be assumed. When the Legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which has not been said immediately before."

"To reject words as insensible," said Erle, C.J., in *R. v. St. John, Westgate, Burial Board* (i), "is the *ultima ratio* when an absurdity would follow from giving effect to the words of an enactment as they stand". In *R. v. Berchet* (k), it was said to be a known rule of interpretation of statutes, that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent (l). And in *Harcourt v. Fox* (m), Lord Holt said: "I think we should be very bold men, when we are entrusted with the interpretation of Acts of Parliament, to reject any words that are sensible in an Act." This rule has often been acted upon. Thus, in *Green v. R.* (n), Lord Cairns states, as a reason for differing from the Court below, that "the learned Judges absolutely reduce to silence the second part of this sentence, and make it altogether inapplicable." So in *Cooper v. Slade* (o), in the Court below, Bramwell, B., was inclined to treat the proviso at the end of section 2 of the Corrupt Practices Prevention Act, 1854, as mere surplusage; but in his advice to the House of Lords (p), he stated that he had altered his opinion as to this, because it appeared that a reasonable construction could be put upon that proviso, and therefore that construction ought to be adopted, instead of treating that proviso as if it did not exist at all. So in *East London Ry. v. Whitechurch* (q), Lord Cairns expressed a strong opinion

(g) "All contracts and agreements by parol or in writing by way of gaming or wagering shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made . . .".

(h) [1908] 2 K. B. 696. Cf. the dissenting judgment of Fletcher Moulton, L.J., which was affirmed by the House of Lords in *Hill v. William Hill (Park Lane) Ltd.* (*supra*).

(i) (1862), 2 B. & S. 703, 706.

(k) (1688), 1 Show. 108.

(l) This *dictum* of Sir B. Shower was quoted by the Court in *R. v. Bishop of Oxford* (1879), 4 Q. B. D. 245, 261, as "a settled canon of construction."

(m) (1693), 1 Show. 506, 532.

(n) (1876), 1 App. Cas. 513, 537.

(o) (1858), 6 H. L. Cas. 746.

(p) (1858), 6 H. L. C. 672, at p. 765.

(q) (1874), L. R. 7 H. L. 81, 91.

against treating words in an Act of Parliament as surplusage, if any meaning can be put upon them. In that case the question at issue was as to the meaning of section 128 of the East London Railway Act, 1865, which enacted that, "while the company are possessed under this Act of any lands liable to be assessed to any rate, they shall, from time to time, until the railway or works thereof are completed, *and assessed or liable to be assessed*, be liable to" pay a deficiency rate. It was argued by the parish that this deficiency rate was payable until the whole railway was completed, thus treating the words "and assessed, or liable to be assessed," as mere surplusage. But the House of Lords held that these words were not to be so treated. "If," said Lord Cairns, "your lordships were to adopt this construction the consequence would be that all those words which follow the word 'completed' might be entirely removed, and ought to be removed out of the clause, because, if the deficiency rate is payable before the railway is completed from end to end, the words that ought to have been used would be simply 'until the railway or the works thereof shall be completed,' and those words following, 'and assessed, or liable to be assessed,' ought not to be added; they would be entirely superfluous". In a modern case (*r*) *Clauson, J.*, had to consider the disqualification of an elected member of a local authority who had been convicted. The relevant statute was the Local Government Act, 1933, section 59 (1). The learned Judge said: "If the section is to be read as providing that a person is disqualified from being a councillor if he was convicted within five years before his election, it may well be that he was so disqualified when he acts as a councillor at a date later than five years from the date of the conviction. In that case the effect of the disqualification operating would be that he would cease to be a councillor, but he would be eligible at once for re-election to the vacant office, the five years having expired before the new election. I cannot think that the Legislature intended such a whimsical result."

Rejection of surplusage.

6. But a Court of law will reject words as surplusage (*s*) if it appears that, by "attempting to give a meaning to every word, we should," as Coleridge, J., said in *R. v. East Ardsley (Inhabitants)* (*t*), "have to make the Act of Parliament insensible," or if it is clear that otherwise the manifest intention of the Legislature will be defeated. Thus, in *Fisher v. Val de Travers Asphalte Co.* (*u*), a question arose whether

(*r*) *Bishop v. Deakin*, [1936] 1 Ch. 409, 414.

(*s*) "Nothing can be more mischievous than to attempt to wrest words from their proper and legal meaning only because they are superfluous": *Hough v. Windus* (1883), 12 Q. B. D. 224, 229, Lord Selborne. Approved by Lord James in *Garbutt v. Durham Joint Committee*, [1906] A. C. 291, 297, where he explained the process whereby superfluous words come to be inserted in Bills in Parliament. The statute in question was the Police Act, 1890—"so unfortunately drawn that there is room for a good deal of doubt as to its true meaning"—Lord Loreburn, L.C., *ib.*, at p. 293.

(*t*) (1850), 14 Q. B. 793, 801.

(*u*) (1875), 1 C. P. D. 259.

a Judge belonging to a particular Division of the Court was not entitled to hear an appeal from the Divisional Court of that Division even though he himself had not taken part in making the order appealed from. Section 4 of the Judicature Act, 1875, enacted that "no Judge shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of which he was *and is* a member." It was held that, in order to give a meaning to the section, the words "and is" must be rejected. So in *Stone v. Yeovil Corporation* (x), where section 9 of the Lands Clauses Consolidation Act, 1845, was in question. Brett, J., said: "The word 'such' in the second branch of that clause would seem at first sight to apply to lands purchased or taken; but if so read it is insensible. It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document, but that if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated. It seems to me therefore that the word 'such' must be eliminated from this part of the clause." More recently under section 4 of the Vagrancy Act, 1824, the statement that a dwelling house was occupied by a named tenant was held to be mere surplusage and might be disregarded (y).

The question at times arises whether, admitting a statute to have a certain intention, it must, through defective drafting or faulty expression, fail of its intended effect or whether necessary alterations may be made by the Court (z). The rule on this subject laid down in the Privy Council in *Salmon v. Duncombe* (a), is as follows: "It is, however, a very serious matter to hold that, where the intention of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of justice to come to such a conclusion, but their lordships hold that nothing can justify it except necessity, or the absolute intractability of the language used". The Colonial ordinance in question contained a provision "as if such subject resided in England," the effect of which was to reduce the relevant section of the ordinance to a nullity. The words quoted were held to be immaterial.

Words designedly omitted may assist interpretation.

7. Sometimes, if the meaning of an enactment is not plain, light may be thrown upon it by observing that certain words "have been," as Brett, L.J., said in *Union Bank of London v. Ingram* (b), "designedly

(x) (1876), 1 C. P. D. 691, 701.

(y) *Hollyhomes v. Hind*, [1944] K. B. 571.

(z) See *R. v. Vasey*, [1905] 2 K. B. 748, where section 22 of the Malicious Injuries to Property Act, 1861, as amended by section 13 of the Salmon Fisheries Act, 1873, was held to be impossible of a grammatical construction. It was construed to effect the plain intention of the Legislature. *R. v. Ettridge*, [1909] 2 K. B. 24. (Criminal Appeal Act, 1907, s. 4. (3).)

(a) (1886), 11 App. Cas. 627, 634.

(b) (1882), 20 Ch. D. 463, 465 (the words "instead of a foreclosure" omitted from Conveyancing Act, 1882, s. 25).

omitted." Thus, in *Att.-Gen. v. Sillem* (c), in discussing the meaning of section 7 of the repealed Foreign Enlistment Act, 1819, which enacted that, "if any person . . . equip, furnish, fit out, or arm . . . any vessel with intent that such vessel shall be employed in the service of any foreign prince," for warlike purposes, such person shall be liable to certain punishments, Pollock, C.B., pointed out that the clause did not contain the word "build." To this the Attorney-General replied: "It is dangerous to try to explain a statute by words that are not to be found in it." Pollock, C.B., however, in his judgment, said as to this: "On the first impression, the objection of the Attorney-General seems not at all unreasonable, but the answer, on a little consideration, is quite obvious. In order to know what a statute *does* mean, it is one important step to know what it *does not* mean; and if it be quite clear that there is something which it *does not* mean, then that which is suggested or supposed to be what it *does* mean must be in harmony and consistent with what it is clear that it *does not* mean. What it forbids must be consistent with what it permits. The 7th section contains the words 'equip, furnish, fit out, and arm,' but it does not contain the word 'build,' and I think no one can doubt that that word was purposely omitted from the Act" (d). Section 16 of the Licensing Act, 1872, consisted of a series of clauses headed "Offences against Public Order" (e). The section contained three sub-sections, the first of which defines offences which must be "knowingly" committed; the other two sections omit the word "knowingly." Consequently, in *Mullins v. Collins* (f), where the defendant was prosecuted because his servant supplied a constable on duty with drink, it was held to be no defence on his part that his servant had done this without his knowledge. "The appellant," said Archibald, J., "has been convicted under the second sub-section, where the word 'knowingly' is omitted. This seems to point to the conclusion that the licensed victualler will be liable for the act of his servant although he himself has not knowingly committed an offence against the second sub-section" (g).

The use of the word "permitting" in section 13 of the same Act has been held to make proof of knowledge necessary to constitute an offence within the clause, although in other sections (e.g., section 14) the Legislature has used the words "knowingly permits" (h).

(c) (1863), 2 H. & C. 431, 515.

(d) The Act is now repealed and superseded by the Foreign Enlistment Act, 1870, which contains (s. 8) the word "build" as well as "equip"; and see s. 30.

(e) S. 16 is re-enacted as s. 78 of the Licensing (Consolidation) Act, 1910, which is one of a series of clauses under the heading "General regulations as to sale of liquor and conduct of licensed premises."

(f) (1874), L. R. 9 Q. B. 292, 295.

(g) See also *Bond v. Evans* (1888), 21 Q. B. D. 249; *Dyke v. Gower*, [1892] 1 Q. B. 220; *Parker v. Alder*, [1899] 1 Q. B. 20; *Brooks v. Mason*, [1902] 2 K. B. 743; *Hobbs v. Winchester Corporation*, [1902] 2 K. B. 743; *Andrews v. Luckin* (1917), 87 L. J. K. B. 507; *Allard v. Selfridge & Co.*, [1925] 1 K. B. 137, but cf. *Sherras v. De Ruizen*, [1895] 1 Q. B. 918, 921, 922, and as to *mens rea*, Part III, chap. ii, *post*.

(h) *Somerset v. Wade*, [1894] 1 Q. B. 574.

CHAPTER III

WHAT MAY AND WHAT MAY NOT BE IMPLIED IF THE MEANING IS NOT PLAIN

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Construction by implication.

1. If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is "not to import into statutes words which are not to be found there" (a), and there are particular purposes for which express language is absolutely indispensable (see *ante* p. 70). "Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context" (b).

Implication to prevent words from being deprived of all meaning. It has already been stated that if a matter is altogether omitted from a statute (c), it is clearly not allowable to insert it by implication, for to do so would "not be to construe the Act of Parliament, but to alter it" (d). But where the alternative lies between either supplying by implication words "which appear to have been accidentally omitted," or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words (e). Perhaps the best known and most obvious omission in a statute occurs in Lord Tenterden's Act (the Statute of Frauds Amendment Act, 1828), which enacts that no action shall be brought on a representation, not in writing, to the intent that a person "may obtain credit, goods or money upon." The text is clearly imperfect. Lord Abinger thought the word "upon" should be rejected as nonsense: Parke, B., thought either the phrase might be transposed to read "may obtain goods or money upon credit" or that the words "such representation" should be supplied

(a) *Per Patteson, J.*, in *King v. Burrell* (1840), 12 A. & E. 460, 468.

(b) *Tinkham v. Perry*, [1951] 1 T. L. R. 91, at p. 92, Evershed, M.R.

(c) See p. 67, *ante*.

(d) *Per James, L.J.*, in *Re Sneezum* (1876), 3 Ch. D. 463, 472.

(e) *Jubb v. Hull Dock Co.* (1846), 9 Q. B. 455.

after the word “upon” (*f*). In *Re Wainwright* (*g*), Lord Lyndhurst, L.C., said, as to section 33 of the Fines and Recoveries Act, 1833: “There is an omission here which it is proper to notice. The words are, ‘If any person, protector of a settlement, shall be convicted of treason or felony, or if any person, not being the owner of a prior estate under a settlement, shall be the protector of such settlement and shall be an infant, or if it shall be uncertain whether such last-named person be living or dead, then His Majesty’s High Court of Chancery shall be the protector of such settlement, in lieu of the person who shall be an infant or whose existence cannot be ascertained’—omitting the case of a person convicted of treason or felony. But I think that the omission must be supplied by implication, otherwise no effect can be given to the previous words, ‘if any person, protector of a settlement, shall be convicted of treason or felony.’ Now these words cannot be struck out of the Act, and it is much more natural to supply the words, ‘in lieu of the person who shall be convicted,’ than to adopt a construction which would deprive the preceding words of all meaning.”

The Common Law Procedure (Ireland) Act, 1853 (*h*), s. 135, enacted that “if a debtor have an estate or interest in any stock, funds, annuities, or shares or *money* . . . it shall be lawful for the Court to make such order as to such stock, funds, annuities, shares, and the dividend, interest, and annual produce thereof as if the same had been standing in the name of a trustee for such judgment debtor, but no such order shall prevent the Bank of Ireland from permitting any transfer of such stocks, funds, annuities, and shares or *money*. . . .” In *Quin v. O’Keefe* (*i*), the question arose whether, as this section omitted the word “money” in the second clause, it was competent for the Court to make an order with respect to *money*. The Court, following *Re Wainwright* (*k*), held that it was competent for them to supply this word by implication, and Lefroy, C.J., said: “I admit that in section 135, where it is said that it shall be lawful for the Court to make such order, the word *money* is dropped, and that the order is only to be made ‘as to such stock, funds, annuities, shares, and the dividend, interest, and annual produce thereof,’ but in a subsequent part of the section the word ‘money’ is introduced, thus clearly bringing it within the operation of the proviso, and if the proviso is to have any effect at all in respect of it, it must be upon the supposition that it was contemplated as being otherwise included in the body of the section. . . . Unless, therefore, we insert the word ‘money’ into the enacting part of the section, that section as to *money* will be completely nugatory.” But in *Underhill v. Longridge* (*l*),

(*f*) *Lyde v. Barnard* (1836), 1 M. & W. 101, 115.

(*g*) (1843), 1 Phil. 258, 261.

(*h*) 16 & 17 Vict. c. 113.

(*i*) (1859), 10 Ir. C. L. R. 407.

(*k*) *Supra*.

(*l*) (1859), 29 L. J. M. C. 65, 66, Cockburn, C.J.

the Court declined to act upon the authority of *Re Wainwright* (k), or to supply certain words by implication. The case turned on 18 & 19 Vict. c. 108, s. 9, which enacted that "if loss of life to any person employed in a coal mine occurs by reason of any accident within such coal mine, or if any serious personal injury arises from explosion therein, the owner of such mine shall, within twenty-four hours next after such loss of life, send notice of such accident," etc., or be liable to a penalty. An accident having occurred which caused "serious personal injury," but not loss of life, it was contended that the owner of the mine ought to have sent notice of the accident, for it was argued that it was quite clear that there was an accidental omission after the words "such loss of life," and that the Legislature must have intended to insert the words "or such serious personal injury," otherwise the words "or if any serious personal injury arises from explosion therein" are wholly inoperative. The Court, however, declined to imply that these words had been omitted by accident, for "we cannot," said the Court, "take upon ourselves the office of the Legislature" (m).

Implication where enabling statutes omit some detail. If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out. Thus, in *Cookson v. Lee* (n), a private Act vested certain lands in trustees for the purpose of enabling them to sell the lands for building purposes, but the Act contained no express power to expend any portion of the purchase moneys in setting out the lands or in making roads. Under these circumstances the Court held that, having regard to the object of the Act—namely, the sale of the property as building land—such power ought to be implied. "In point of fact," said the Court, "the Act of Parliament did not contain that which Acts of Parliament of a similar nature generally do contain, namely, power to apply a portion of the purchase money in the making of roads and giving facilities for putting the property in a state in which it is capable of being sold and immediately used for building purposes. It did not do that expressly. . . . We must take it [the Act] as we find it and one very natural question is—whether if it does not in terms do so, it does not do it by implication—whether we must not infer from the powers given, the Legislature considered that they had given the power which is contended for, or whether, directing something to be done, they must not be considered by necessary implication to have

(m) In Maxwell, 9th ed., p. 279, it is said that if in this case the statute had been a remedial one, instead of being a penal statute, "the omission would probably have been supplied," as it was in the case of *Re Wainwright* (1843), 1 Phil. 258. This may be so, but the Court did not give this as their reason for refusing to supply the omission; and see *Quin v. O'Keefe* (1859), cited p. 104 ante. For other instances of the refusal of the Court to supply provisions to statutes, cf. *Hammond v. Pulsford*, [1895] 1 K. B. 223; *R. v. Dods*, [1905] 2 K. B. 40, 49, Collins, M.R.

(n) (1854), 23 L. J. Ch. 473, 475, Lord Cranworth, L.C.

empowered that to be done which was necessary in order to accomplish the ultimate object.”

The Courts have sometimes felt constrained to narrow the effect of a repealing section in order to give full effect to the intention of the Act containing it. Section 33 of a local Act of 1877 (the Metropolitan Street Improvements Act, 1877, incorporating the Lands Clauses Consolidation Acts, 1845, 1860 and 1869), provided for the purchase of lands for the accommodation of the working classes likely to be displaced by certain metropolitan improvements. Section 3 of a subsequent local Act of 1882 provided that the provisions of section 33 should cease to be in force with respect to certain lands mentioned, and that in relation thereto the earlier Act should be read as though section 33 were not contained therein. In *Wigram v. Fryer (o)*, North, J., held that the Legislature plainly intended that buildings for the housing of the working classes should be erected; and that, to give effect to this intention, the Court must imply that the later Act conferred upon, or preserved to, the authority the powers expressly conferred by the repealed section of the Act of 1877, and he said: “it is a very lamentable way of legislating that one should be driven to get at the meaning of these Acts by removing difficulties (as far as can be done) by construction rather than that the intention of the Legislature should be clearly expressed upon the face of the Act.”

Express language necessary in certain cases.

2. Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes:—Imposing a tax (*p*) or charge; Conferring or taking away legal rights, whether public or private; Excepting from the operation of or altering clearly established principles of law; Altering the jurisdiction of Courts of law.

(a) *For imposing a tax or charge.* If a statute professes to impose a charge, “the rule,” said the Judicial Committee in *Oriental Bank v. Wright (q)*, is “that the intention to impose a charge upon a subject must be shown by clear and unambiguous language” (*r*). In *Dock Co. at Kingston-upon-Hull v. Browne (s)*, Lord Tenterden, C.J., said:

(o) (1887), 36 Ch. D. 87, 99.

(p) Also exempting from a tax or rate. “Duties given to the Crown,” said Lord Selborne in *Mersey Docks etc. Board v. Lucas* (1833), 8 App. Cas. 891, 902, “taxes imposed by the authority of the Legislature, by public Acts for public purposes, cannot be taken away by general words in a local and personal Act. . . .” As to whether the exemption is limited to taxes existing at the date of the Act, see *Stewart v. Thames Conservators*, [1908] 1 K. B. 893 (income tax). As to exemption from rates, see *Sion College Case*, [1901] 1 K. B. 617, *Mayor, etc., of London v. Netherlands Steamboat Co.*, [1906] A. C. 263, 268, *Associated Newspapers Ltd. v. London Corporation*, [1916] 2 A. C. 429, and p. 552 *post*.

(q) (1880), 5 App. Cas. 842, 856.

(r) To the same effect, see *Simms v. Registrar of Probates*, [1900] A. C. 323, 337. *Re Earl Fitzwilliam's Agreement*, [1950] Ch. 448, the effect of which was nullified by the Finance Act, 1950 (14 Geo. 6, c. 15), s. 46.

(s) (1831), 2 B. & Ad. 43, 58, quoted with approval by Vaughan Williams, L.J., in *Assheton-Smith v. Owen*, [1906] 1 Ch. 179, 205.

"These rates are a tax on the subject and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the Legislature to impose it." This accords with the view expressed by Parke, B., in *Re Micklethwait (t)*: "It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words." In *Partington v. Att.-Gen. (u)*, Lord Cairns said: "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute" (x). In *Canadian Eagle Oil Co. v. R. (y)*, Viscount Simon, L.C., said: "In the words of the late Rowlatt, J., (in *Cape Brandy Syndicate v. I. R. C.*, [1921] 1 K. B. 64, 71) whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase 'in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'" In a recent case in the House of Lords (z), Lord Thankerton said: "Counsel are apt to use the adjective 'penal' in describing the harsh consequences of a taxing provision, but if the meaning of the provision is reasonably clear, the Courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is capable of two alternative meanings the Courts will prefer that meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the Courts will be unable to regard it as of any effect."

"Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning;

(t) (1855), 11 Ex. 452, 456. Cf. *Lumsden v. I. R. C.*, [1914] A. C. 877, 896, Viscount Haldane, L.C.

(u) (1869), L. R. 4 H. L. 100, 122.

(x) Quoted and adopted in *Att.-Gen. v. Earl of Selborne*, [1902] 1 K. B. 388, 396, Collins, M.R., in a case as to succession duty; and by Farwell, L.J., in *Dyson v. Att.-Gen.*, [1912] 1 Ch. 158, 171, a case on the validity of "Form 4" issued by the Commissioners of Inland Revenue under the Finance (1909—1910) Act, 1910, asking for particulars of property in the occupation of the person to whom it was sent, and in *Potts' Executors v. I. R. C.*, [1949] 2 A. E. R. 555, 558, 560, Sir R. Evershed, M.R. See also *Cox v. Rabbits* (1878), 3 App. Cas. 473, 478, Lord Cairns; *Whiteley, Ltd. v. Burns*, [1908] 1 K. B. 705, 709, Lord Alverstone, C.J.

(y) [1946] A. C. 119, 140.

(z) *I. R. C. v. Ross & Coulter*, [1948] 1 A. E. R. 616, at p. 625.

and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by any attempt to construe it benevolently in favour of the Crown" (a). Lord Halsbury said in *Lord Advocate v. Fleming* (b), "I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say we have no governing principle of the Act to look at; we have simply to go on the Act itself, to see whether the duty claimed is that which the Legislature has enacted"; and in *Tennant v. Smith* (c), he said: "In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act except to take such tax as the statute imposes. . . . Cases, therefore, under the Taxing Acts always resolve themselves into the question whether or not the words of the Act have reached the alleged subject of taxation." And Lord Hanworth, M.R., said: "Either in the clear words of a taxing statute the subject is liable or if he is not within the words, he is not liable" (d). "The Crown does not tax by analogy but by statute" (e). And Lord Parker of Waddington (f): "The Finance Act is a taxing statute and if the Crown claims a duty thereunder it must show that such a duty is imposed by clear and unambiguous words." "It is not the function of a Court of law to give to words a strained and unnatural meaning," said Lord Simonds (g), "because only thus will a taxing section apply to a transaction which had the legislature thought of it, would have been covered by appropriate words." This rule, said Lord Cairns in *Pryce v. Monmouthshire Canal Co.* (h), "probably means little more than this, that inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the taxpayer has a right to stand upon the literal construction of the words used, whatever might be the consequence."

The rule just stated while valuable as a caution, cannot be taken as varying the ordinary rules for construing all statutes including taxing Acts. In *Att.-Gen. v. Carlton Bank* (i), Lord Russell of Killowen, C.J., said: "I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, *viz.*, to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to

(a) *Att.-Gen. v. Earl of Selborne*, *supra*, 396, Collins, M.R.

(b) [1897] A. C. 145, 151.

(c) [1892] A. C. 150, 154.

(d) *Dewar v. I. R. C.*, [1935] 2 K. B. 357, 360.

(e) Lord Sumner in *Ormond Investment Co. v. Betts*, [1928] A. C. 143, 158

(f) *Att.-Gen. v. Milne*, [1914] A. C. 765, 781.

(g) *I. R. C. v. Wolfson*, [1949] 1 A. E. R. 865, 868.

(h) (1879), 4 App. Cas. 197, 202

(i) [1899] 2 Q. B. 158, 164.

the context in connection with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by considerations of hardship or business convenience, or the like." The burden is however of course on the Crown to show that the subject is within the provisions of the Act. Speaking of section 20 (1) (c) of the Finance Act, 1922, Lord Greene, M.R., said the burden was on the Crown "to establish affirmatively that the income (of a settlement) is, not that it may be, payable or applicable to some period less than the life of the child" (k).

Tax on whole of United Kingdom. If a statute imposes a tax upon the whole United Kingdom, it is construed so far as its terms allow in such a way that like interests in property may be subjected to like charges, wheresoever in the United Kingdom the property is situate, and so that all the subjects of each kingdom may be taxed equally under the same circumstances. Therefore, as Lord Campbell said in *Braybrooke v. Att.-Gen. (l)*, such a statute must be "construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed." But in *New York Breweries Co. v. Att.-Gen. (m)*, Lord Halsbury pointed out that the words "executor" or "administrator," when used in a taxing Act, are used as meaning an English executor or an English administrator, and not as including persons who fill that character in some other country.

On a question of the meaning of "partnership" which differs in English and Scottish Law, Viscount Simon, L.C., said: "In construing a taxing statute (the Income Tax Act, 1918), which applies to England and Scotland alike, it is desirable to adopt a construction of the statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities of taxation between citizens of the two countries" (n). The Courts, in dealing with taxing Acts, will not presume in favour of any special privilege of exemption from taxation. Lord Young in *Hogg v. Parochial Board of Auchtermuchty (o)*, said: "I think it proper to say that, *in dubio*, I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation."

The rule as to the need of express words to impose or exempt is acted upon with regard to all kinds of charges.

Dock dues. Thus, with regard to dock dues, in *Gildart v.*

(k) *Mauray v. I. R. C.*, [1944] 1 K. B. 545, 549.

(l) (1861), 9 H. L. C. 150, 165.

(m) [1899] A. C. 62, 68.

(n) *I. T. C. v. Gibbs*, [1942] A. C. 402, 414. Cf. *Newman v. Lipman*, [1950] 2 A. E. R. 832, 834, Lord Goddard, C.J.

(o) (1880), 7 Rettie (Sc.) 986.

Gladstone (p), the Court, in deciding that the dock due in question was rightfully claimed, said: "If the words of the statute would fairly admit of a different meaning, it would be right to adopt that which would be most favourable to the interest of the public . . . because the public ought not to be charged unless it is clear that it was so intended; but we think that the words here used are plain."

Railway and canal charges. In *Stockton and Darlington Ry. v. Barrett (q)*, Lord Lyndhurst, L.C., said: "If it was a case of doubt, the rule is in Acts of this nature [a railway Act levying charges] to adopt the construction most beneficial to the public"; and this rule was adopted as to canal charges in *Pryce v. Monmouthshire Canal Co. (r)*.

Poor rates. By section 1 of the Poor Relief Act, 1601, occupiers of coal mines were to be rated for the relief of the poor, but no other mines were mentioned in the statute. In *R. v. Sedgley (s)*, it was argued that the coal mines might be considered as having been mentioned in the statute as examples, and that, in fact, it was intended that the occupiers of all kinds of mines should be rated. This argument was rejected, and it was held that, according to the maxim *expressio unius*, the expression "coal mines" had the effect of excluding all other mines.

Stamps. With regard to the Stamp Acts, Lord Tenterden said, in *Tomkins v. Ashby (t)*, "Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature."

(b) *For conferring rights.* Rights cannot be conferred by mere implication from the language used in a statute, but there must be a clear and unequivocal enactment (u). By section 9 of the Municipal Corporations Elections Act, 1869, it was enacted that whenever in Acts relating to municipal elections "words occur which import the masculine gender, the same shall be held to include females." By the Married Women's Property Act, 1870, coverture ceased to be an absolute bar to the holding of property by a married woman. It was contended, in *R. v. Harrald (x)*, that the former enactment might reasonably be held to apply, not only to single but also to married women; but it was held otherwise. "By the common law," said Cockburn, C.J., "a married woman is incapable of voting. . . . It is quite clear that the Act of 1869 had not married women in its contemplation, nor can it be supposed that the subsequent statute of

(p) (1809), 11 East 675, 685.

(q) (1844), 11 Cl. & F. 590, 601.

(r) (1879), 4 App. Cas. 205. See also *Leeds and Liverpool Canal v. Hustler* (1823), 1 B. & C. 424; and *Laird v. Clyde Navigation Trustees* (1879), 6 Rettie (Sc.) 785.

(s) (1831), 2 B. & Ad. 65.

(t) (1827), 6 B. & C. 541, 542.

(u) Therefore, "a saving clause," as Wood, V.-C., said in *Arnold v. Gravesend Corporation* (1856), 2 K. & J. 574, 591, "cannot be taken to give any right which did not exist already." As to provisos, see p. 201, *post*.

(x) (1872), L. R. 7 Q. B. 361, 362.

1870, by which the status of married women with regard to the power to hold property has been recognised and established, and which was passed *alio intuitu*, has by a side wind given them political and municipal rights" (y).

So also in *The claim of the Viscountess Rhondda* to a summons to the House of Lords (z), where the Sex Disqualification (Removal) Act, 1919, was relied on, it was held that it could not be presumed that Parliament intended such a radical change in the constitution of this country by the "side wind" of that Act.

(c) *To impose new obligations.* In cases of doubt Courts will lean to a construction that an enactment is not intended to impose a serious new obligation, but only to provide new or better means of enforcing an existing obligation (a).

(d) *To take away public or private rights.* There is a presumption that existing rights, public or private, are not taken away, at least without compensation. In *Re Cuno* (b), Bowen, L.J., said: "In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

As Brett, M.R., said in *Att.-Gen. v. Horner* (c): "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it." Therefore rights, whether public or private, are not to be taken away, or even hampered (d), by mere implication from the language used in a statute, unless, as Fry, J., said in *Mayor, etc. of Yarmouth v. Simmons* (e), "the Legislature clearly and distinctly authorise the doing of something which is physically inconsistent with the continuance of an existing right" (f).

(y) See also *Chorlton v. Lings* (1868), L. R. 4 C. P. 374; *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79; *De Souza v. Cobden*, [1891] 1 Q. B. 687; *Nairn v. University of St. Andrews*, [1909] A. C. 147. The disabilities of women have now been entirely abolished by a series of statutes. See especially the Representation of the People Act, 1918, the Parliament (Qualification of Women) Act, 1918, the Sex Disqualification (Removal) Act, 1919, the Law Reform (Married Women and Tortfeasors) Act, 1935, which makes the contractual capacity and liability of a married woman the same as that of a *feme sole*. See also *Edwards v. Att.-Gen. of Canada*, [1930] A. C. 124, which contains a review of the law relating to the previous incapacity of women.

(z) [1922] 2 A. C. 339.

(a) *Finch v. Bannister*, [1908] 1 K. B. 485, 489, affd. [1908] 2 K. B. 441; *Gaby v. Palmer* (1916), 85 L. J. K. B. 1240, 1244, Lord Reading, C.J.

(b) (1889), 43 Ch. D. 12, 17. For an instance of implied interference with private rights upheld by the Court cf. *Edgington v. Swindon Corporation*, [1939] 1 K. B. 86.

(c) (1884), 14 Q. B. D. 245, 257, cited with approval by Greer, L.J., in *Conssett Iron Co. v. Clavering*, [1935] 2 K. B. 42, 58, and by Sir Wilfred Greene, M.R., in *Bond v. Nottingham Corporation*, [1940] Ch. 429, 435.

(d) *L. N. W. Ry. v. Evans*, [1893] 1 Ch. 16, 27.

(e) (1878), 10 Ch. D. 518, 527.

(f) *I.e.*, the words taking away the right should be clear and unambiguous. See *Campbell v. Macdonald* (1902), 22 N. Z. L. R. 65, 69, a case in which it was contended that the Fisheries Protection Acts of New Zealand justified regulations preventing a man from fishing *ex adverso* his own lands. *F. E. Jackson & Co. Ltd. v. Collector of Customs*, [1939] N. Z. L. R. 682, 733.

“In order to take away a right, it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right; it must also be shown that the Legislature have authorised the thing to be done at all events, and irrespective of its possible interference with existing rights” (g). Section 2 of the Gifts for Churches Act, 1811, enacts that certain lords of manors may grant for public purposes any waste land of the manor, “freed and absolutely discharged from all rights of common.” In *Forbes v. Ecclesiastical Commissioners* (h), it was contended that this enactment authorised the lord to discharge the land, not only of manorial rights, but also of public or customary rights. But it was held that “the language of the statute was fully satisfied by interpreting it to mean, what indeed is the plain and natural meaning of the words used, a power to discharge the land of manorial rights. To hold otherwise would be to destroy by a side wind public rights which were not in the contemplation of the Legislature” (i).

In *Gray v. R.* (k), the question arose whether the right of a person tried for felony to challenge peremptorily twenty of the jurors summoned to try him extended to a new felony created by the Treason Felony Act, 1848. It was held that it did. “A prisoner,” said Tindal, C.J., “is not to be deprived by implication of a right of so much importance to him, given by the common law and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute” (l). So also with regard to the right of trial by jury. “An Act of Parliament,” said Best, C.J., in *Looker v. Halcomb* (m), “which takes away the right of trial by jury . . . ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act.” Again, it being a recognised right that “no man is to be deprived of his property without his having an opportunity of being heard” (n), it was laid down in that case by Byles, J. (o), that, “although there may be no positive words in a statute requiring that

(g) *Western Counties Ry. v. Windsor, etc., Ry.* (1882), 7 App. Cas. 178, 189 P. C., per Lord Watson.

(h) (1872), L. R. 15 Eq. 51, 53.

(i) In *R. v. Strachan* (1872), L. R. 7 Q. B. 463, 465, it was argued that, by virtue of 33 & 34 Vict. c. 97, Sch. (Voting paper), which enacted that “any instrument for the purpose of voting by any person entitled to vote at any meeting” should be liable to a penny stamp duty, it became necessary for voting papers used at municipal elections to be stamped. “But,” said Cockburn, C.J., “it can never have been the intention of the Legislature, by such an enactment as this—viz., by the use of the words ‘at any meeting’ in the schedule—to have altered the whole system of voting at public elections”.

(k) (1844), 11 Cl. & F. 427.

(l) *Ib.*, p. 480. This dictum of Tindal, C.J., was cited with approval by the Judicial Committee in giving judgment in *Levinger v. R.* (1870), L. R. 3 P. C. 282, 289, a case in which a similar point was raised. See this case cited below, Part II, chap. iv, p. 317 *post*, on “Effect of Statutes on the Common Law.”

(m) (1827), 4 Bing. 183, 188.

(n) Per Erle, C.J., in *Cooper v. Wandsworth Board of Works* (1863), 14 C. B. (N.S.) 180, 187.

(o) *Ibid.*, at p. 194.

a party shall be heard, yet a long course of decisions, beginning with *Dr. Bentley's Case* (p), established that the justice of the common law will supply the omission of the Legislature."

Reservation of rights ex abundanti cautela. In Acts of Parliament, especially in private Acts, it has sometimes, *ex abundanti cautela*, been thought necessary specially to reserve rights. For instance, in certain Acts regulating the law of bankruptcy (q), the privilege of freedom from arrest belonging to peers of Parliament was specially preserved. But this special reservation was unnecessary, for, "it is not because, *ex majori cautela*, several Acts of Parliament have thought it necessary specially to reserve that privilege, that it is to be held to be abolished and annihilated in every other Act of Parliament in which it is not expressly reserved" (r).

So also Lord Halsbury in *McLaughlin v. Westgarth* (s): "The misfortune in the framing of these statutes is that any body of persons, seeing a possibility of liability on their part, apply to Parliament to have special provisions inserted for their protection. That application is occasionally complied with and then the argument arises, which their Lordships have heard today—namely, that anybody who is not included in the enumeration of the particular persons so inserted must be taken to be excluded by the operation of the statute from protection, just because they are not included and others are. A great many things are put into a statute *ex abundanti cautela*."

Effect of Act on private rights. The effect of an Act of Parliament upon a private right was much discussed in *Walsh v. Secretary of State for India* (t). In that case it appeared that Lord Clive, whose representative the plaintiff was, had transferred to the East India Company a sum of money, and they had covenanted to pay out of that sum pensions to disabled officers and soldiers so long as the Company employed troops in India, and if they ceased to employ troops, the money was to be handed back to Lord Clive or his representatives. By the Government of India Act, 1858, the government of India was transferred from the Company to the Crown, and the same Act vested in the Crown all the funds at the disposal of the Company, and it was contended on the part of the Crown that, although the Company had ceased to employ troops in India, this Act had deprived the plaintiff of his right to have the money handed back to him. The House of Lords, however, did not adopt this view, and they held that as this claim of Lord Clive's representative against the Company was neither expressly released nor prohibited by the Act in question, that Act could not in any manner avail to take away the right of action

(p) (1723) 1 Str. 557; 2 Ld. Raymond 1334; 8 Mod. 148; Fort. 202.

(q) 4 Geo. 3, c. 33, s. 4, and 12 & 13 Vict. c. 106, s. 66: see the argument of Sir R. Palmer in *Duke of Newcastle v. Morris* (1870), L. R. 4 H. L. 661. In the *Palmer Act* (19 & 20 Vict. c. 16), and the *Central Criminal Court Act, 1834* (4 & 5 Will. 4, c. 36), a similar reservation is made as to the trial of peers.

(r) *Per Lord Hatherley in Duke of Newcastle v. Morris, supra*, 671.

(s) (1906), 75 L. J. P. C. 117, 118.

(t) (1863), 10 H. L. C. 367, 386.

under that covenant. "This result," said Lord Westbury, "follows of necessity, consistently with every rule by which Acts of Parliament ought to be interpreted, especially the rule that they should be so interpreted as in no respect to interfere with or prejudice a clear private right or title, unless the private right or title is taken away *per directum*." In *Randolph v. Milman* (u), it was contended that by virtue of the Ecclesiastical Commissioners Act, 1840, passed for the purpose of vesting in the Commissioners the estates of certain deaneries, the non-residentiary prebendaries of cathedrals were deprived of their right to vote at the election of proctors. They had enjoyed this right from time immemorial, and there being no express words in the statute by which the right was taken away, the Court decided that they still retained the right. "We agree," said the Court, "with the principle of the law stated by Sir Roundell Palmer at the outset, that vested rights are not to be taken away without express words or necessary intendment or implication. And upon adverting to the statute, it will be found not only that there is no express extinction of the right here claimed, and no necessary implication or intendment to that effect, but that the right and privilege is by the 51st section expressly reserved and continued." The rule is thus expressed by Bramwell, L.J., in *Wells v. London, Tilbury, etc., Ry.* (x): "The Legislature never takes away the slightest private right without providing compensation for it, and a general recital in an Act providing for the execution of public works, that it is expedient that the works should be done, is never supposed to mean that in order to carry them out a man is to be deprived of his private rights without compensation."

It thus appears that the Courts will construe with strictness statutes which entail a deprivation of common law rights. For instance, it has been held that section 1 of the Law of Distress Amendment Act, 1908, must be strictly complied with as the statute deprived the landlord of his common law rights (y). And in *Turton v. Turnbull* (z), where the Agricultural Holdings Act, 1923, was in question, Scrutton, L.J., after pointing out that by section 12 of that Act and by the Landlord and Tenant Act, 1927, the landlord's common law rights had been seriously interfered with, said: "As by the Act he (the landlord) is being deprived of his common law rights, I think we must construe the Act with some liberality in his favour and scrutinise the tenant's claim with some strictness."

(e) *To alter a clear principle of law.* To alter any clearly established principle of law a distinct and positive legislative enactment is necessary (a). "Statutes," said the Court of Common Pleas in

(u) (1868), L. R. 4 C. P. 107, 113, per Kelly, C.B.

(x) (1877), 5 Ch. D. 126, 130.

(y) *Druce v. Beaumont Property Trust Ltd.*, [1935] 2 K. B. 257; cf. *Re Bowman*, [1932] 2 K. B. 621, 632, Swift, J.

(z) [1934] 2 K. B. 197, 200, 201; *West Ham Corporation v. Benabo*, [1934] 2 K. B. 253.

(a) See this point further discussed in chapter on "Effect of Statutes on the Common Law," Part II, chap. iii.

Arthur v. Bokenham (b), "are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare." In *Rolfe v. Flower* (c), it was contended that it was the intention of the Victorian Legislature by the Act 5 Vict. No. 17, s. 39, to alter the well-known principle of bankruptcy law, that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security. In deciding against this contention the Judicial Committee said: "If this were the establishment of a new code of insolvent law, and it was the object of the colonial Legislature to prevent the operation of a rule which they considered unjust, it is hardly to be imagined that they would have committed their intention to the equivocal meaning of a few words in a single section of the Act." So in *Leach v. R.* (d), the question was whether section 4 of the Criminal Evidence Act, 1898, deprived a wife of her common law right to refuse to give evidence against her husband. The House of Lords decided in the negative, observing that such a right could only be taken away by a definite and positive enactment and not by inference from an ambiguous enactment.

(f) *To add to or take from jurisdiction of superior Court.* A distinct and unequivocal enactment is also required for the purpose of either adding to or taking from the jurisdiction of a Superior Court of Law. Thus, in *Smith v. Brown* (e), it was argued that section 7 of the Admiralty Court Act, 1861, which gives jurisdiction to the Admiralty Court over "any claim for damage done by a ship," gave the Admiralty Court jurisdiction to entertain a suit on account of personal injuries occasioned by the collision of two vessels. "But," said the Court, "it seems to us impossible to suppose that the Legislature can have intended under a general enactment like the present, as it were by a side wind, to effect so material a change in the rights and relative positions of the parties concerned in such an action." Similarly, in *Att.-Gen. v. Sillem* (f), the question arose whether section 26 of the Queen's Remembrancer Act, 1859, which gave the Court of Exchequer power to make rules as to the "process, practice, and mode of pleading" on the revenue side of the Court, enabled it to grant a right of appeal in such cases to the Exchequer Chamber, a right which had not previously existed. The House of Lords decided that the Court of Exchequer had no such power, there being no express mention in the Act as to giving any new right of appeal. "The creation," said Lord Westbury, "of a new right of appeal is plainly an act which requires [distinct] legislative authority" (g).

(b) (1708), 11 Mod. 148, 150.

(c) (1866), L. R. 1 P. C. 27, 48.

(d) [1912] A. C. 305.

(e) (1871), L. R. 6 Q. B. 729, 733. Approved in *Seward v. Vera Cruz* (1884), 10 App. Cas. 59.

(f) (1864), 10 H. L. C. 704, 720.

(g) Cf. *R. v. Hanson* (1821), 4 B. & Ald. 519, 521; *Cousins v. Lombard Deposit Bank* (1876), 1 Ex. D. 404, 406. In an Ontario case, *Ahrens v. McGilligat* (1873), 23 Upp. Can. C. P. 171, 174, Gwynne, J., said that a statute relating to the practice and procedure of a Court presumes the existence of jurisdiction, and applies only to

Similarly as to ousting the jurisdiction of a Superior Court. "The general rule undoubtedly is," said Tindal, C.J., in *Albon v. Pyke* (h), "that the jurisdiction of Superior Courts is not taken away except by express words or necessary implication" (i). More recently the Court of Appeal said: "The jurisdiction of the King's Courts must not be taken to be excluded unless there is clear language in the statute which is alleged to have that effect" (k). Therefore, inasmuch as the power of the Court of Queen's Bench to change the venue is a common law power, "words," said Lord Campbell in *Southampton Bridge Co. v. Southampton Board of Health* (l), "should be very strong which are relied upon to take away such power." Lord Salvesen said: "A general rule applicable to the construction of statutes is that there is not to be presumed without express words, an authority to deprive the Supreme Court of a jurisdiction it had previously exercised or to extend the privative jurisdiction of the Supreme Court to the inferior Courts." (m).

This general rule, when relating to the trial of new offences created by statute, was explained by Willes, J., in *Wolverhampton New Waterworks Co. v. Hawkesford* (n), as follows: "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy (o). The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created

matters within the jurisdiction of the Court, and should not be called in aid to create jurisdiction where it is in question and cannot be shown to exist independently of the statute under consideration. Cf. *C. P. R. v. James Bay Ry.* (1905), 36 S. C. R. 42, 73.

(h) (1842), 4 M. & G. 421, 424.

(i) To the same effect Pollock, B., in *Oram v. Breary* (1877), 2 Ex. D. 346, 348; Lord Campbell in *Balfour v. Malcolm* (1842), 8 Cl. & F. 485, 500; Lindley, L. J. in *Payne v. Hogg*, [1900] 2 Q. B. 43, 53. See also *Jacobs v. Brett* (1875), L. R. 20 Eq. 1, 6, Jessel, M.R.; and *L. & N. W. Ry. v. Donellan*, [1898] 1 Q. B. 748, revd. [1898] 2 Q. B. 7 (arbitration only tribunal), appd. *Midland Ry. v. Loseby*, [1899] A. C. 113; folld. *L. & N. W. Ry. v. Jones*, [1915] 2 K. B. 35.

(k) *Goldsack v. Shore*, [1950] 1 A. E. R. 276, 277, per Evershed, M.R. (a case on sec. 2 (1) and (2) of the Agricultural Holdings Act, 1948); [1950] 1 K. B. 708.

(l) (1858), 8 E. & B. 801, 804 (n).

(m) *Dunbar v. Scottish County Investment Co.*, [1920] S. C. 210, 217.

(n) (1859), 6 C. B. (N.S.) 336, 356. See also per Lord Mansfield in *Hartley v. Hooker* (1777), 2 Cowp. 523, 524.

(o) See *R. v. Buchanan* (1846), 8 Q. B. 883, 887; *Stevens v. Chown*, [1901] 1 Ch. 894, 903. The fact that an employer who fails to pay an employee the wages specified by the Corn Production Act, 1917, and is thereby liable to a penalty, does not exclude the jurisdiction of the High Court to entertain a civil action for arrears of wages; *Waghorn v. Collison* (1922), 91 L. J. K. B. 735.

by a statute which at the same time gives a special and particular remedy for enforcing it. . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to." The case before the learned Judge was whether the defendant was a shareholder in the plaintiff company which sued for calls on shares. He said: "Reading the 21st section (of the Companies Consolidation Act, 1845), by the aid of the light thrown upon it by the subsequent sections, it appears to me that the remedy was intended to be enforced only in the particular mode prescribed against persons who are shareholders."

But, as Farwell, J., observes in *Stevens v. Chown* (p), "There is nothing, even when a statute creates an entirely new right and gives a special remedy, to prevent a Court having equitable jurisdiction from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provides a remedy which it enacts shall be the only remedy, subject only to this, that the right so created is such a right as the Court under its original jurisdiction would take cognisance of."

It is now well established that where statutory provisions are made for determining a particular class of difference by arbitration, the jurisdiction of the High Court as to such differences is ousted (q).

In recent times, resort to the Courts has been either restricted or ousted by the now prevalent method of subordinate legislation. This is discussed *post*, Part II chap. iii.

(p) [1901] 1 Ch. 894, 904, citing *Att.-Gen. v. Aspinall* (1837), 2 My. & Cr. 613, 627; *Cooper v. Whittingham* (1880), 15 Ch. D. 501, 506.

(q) *Crisp v. Banbury* (1832), 8 Bing. 394; *Norwich Corporation v. Norwich Tramways Co.*, [1906] 2 K. B. 119; cf. *Crosfield v. Manchester Ship Canal Co.*, [1905] A. C. 421; *R. W. Paul Ltd. v. Wheat Commissioners*, [1937] A. C. 139; *Re Kellner's Will Trusts*, [1949] 2 A. E. R. 43, 47.

CHAPTER IV

WHAT SOURCES OF INFORMATION OUTSIDE A STATUTE MAY BE USED FOR THROWING LIGHT UPON ITS MEANING

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Upon the failure of what Dr. Lushington (*a*), described as "the most satisfactory mode of construction"—*viz.*, examining the statute, and if possible ascertaining the meaning from the statute alone—it is necessary to consider whether it is in any case allowable to have recourse to anything beyond the four corners of the statute for the purpose of ascertaining what was the intention of the Legislature when they passed the particular Act of Parliament which is under consideration.

Circumstances in which Act was passed as assistance to interpretation.

1. The rules laid down in *Heydon's Case* (*b*), allow, to a certain extent, the surrounding circumstances which led to the passing of the Act to be considered.

(*a*) *Gough v. Jones* (1863), 9 Jur. (N.S.) 82, 83.

(*b*) (1584), 3 Co. Rep. 8 a, see p. 91 *ante*.

In *Heydon's Case* it was resolved that for the sure and true interpretation of all statutes "four things are to be discerned and considered: 1st, What was the Common Law before the making of the Act? 2nd, What was the mischief and defect for which the Common Law did not provide? 3rd, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; and, 4th, The true reason of the remedy. And then the office of all the Judges is to make such construction as shall suppress the mischief and advance the remedy . . . according to the true intent of the makers of the Act."

The dominant purpose in construing a statute, said Turner, L.J. (c), is to ascertain the intent of the Legislature, "to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject." And Lord Blackburn said (d): "In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view. For the meaning of words varies according to the circumstances with respect to which they are used." So, too, Lord Halsbury said (e): "To construe the statute now in question it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy." In *Re No. 12 Regent Street, Oxford*, (e²), Jenkins, J., referring Lord Atkinson said: "In the construction of a statute it is of course at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed and to the evil which, as appears from its provisions, it was designed to remedy." In *Re No. 12 Regent Street, Oxford*, (e²), Jenkins, J., referring to the doubt whether it was intended to impose the requirements of s. 87 (2) of the Education Act, 1944, on assurances which under the old law were not subject to restriction, said: "A study of the previous legislation does seem to me to raise a doubt about this, but in my judgment a mere doubt is not enough to justify the Court in departing from what seems to me to be really the plain meaning of the language used. Before the Court would be justified in doing that, I think one

(c) *Hawkins v. Gathercole* (1855), 6 De G. M. & G. 1, 20, citing, *Stradling v. Morgan* (1560), Plow. 204. The rule expressed by Turner, L.J., has often been cited as authoritative, see especially *per* Lords Birkenhead and Wrenbury in *The Claim of Viscountess Rhondda*, [1922] 2 A. C. 339, at pp. 356 and 397 respectively.

(d) *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 763.

(e) *Eastman Photographic Co. v. Comptroller-General of Patents*, [1898] A. C. 571, 575. Cf. *Avery v. L. & N. E. Ry.*, [1938] A. C. 606, 612, 617, *per* Lords Atkin and Macmillan.

(e¹) [1911] A. C. 641, 642.

(e²) [1948] Ch. 735, 746.

must find in the previous legislation something so manifestly inconsistent with the section which one is construing, if construed by itself simply in accordance with its ordinary meaning, as to constrain the Court to say that that cannot be what the legislature meant. The circumstances here fall far short of anything of that kind."

The law before the Act was passed. The cause and necessity of the Act may be discovered, firstly, by considering the state of the law at the time when the Act was passed. In innumerable cases the Courts, with a view to construing an Act, have considered the existing law and reviewed the history of legislation upon the subject (*f*). As Lush, J., said (*g*): "While we are to collect what the Legislature intended from what it has said, we must look not at one phrase or one section only but at the whole of the Act, and must read it by the light which the state of the law at the time . . . throws upon it."

History as an aid to interpretation. It was said by Alderson, B., in *Gorham v. Bishop of Exeter* (*h*), that "we do not construe Acts of Parliament by reference to history," and Farwell, L.J., said in a later case (*i*): "The mischief sought to be cured by an Act of Parliament must be sought in the Act itself. Although it may perhaps be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight." It does not appear however that either of these learned Judges intended to refer to the pre-existing state of the law but to outside influences which may have led to the introduction of the measure. However this may be, in several cases public history as distinguished from the history of the law has been admitted in aid. In the *Claim of Viscountess Rhondda* (*k*), before the Committee of Privileges of the House of Lords, Lord Birkenhead referred to the history of the movement for the enfranchisement of women, and in referring to earlier cases (*l*) he expressly stated that he referred to them not for the purpose of exemplifying the legal view of the status of women, but as instances of the application of the doctrines of *Stradling v. Morgan* (*m*), i.e., as cases in which the Courts admitted extraneous circumstances as an aid to interpretation.

In *Thomson v. Lord Clanmorris* (*n*), Lord Lindley, M.R., said:

(*f*) It is hardly necessary or possible to cite authorities for this proposition. An example of this method of inquiry is the discussion of the Committee of Privileges on *The Claim of Viscountess Rhondda*, *supra*.

(*g*) *S. E. Ry. v. The Railway Commissioners* (1880), 5 Q. B. D. 217, 240.

(*h*) (1850), 5 Ex. 630, 667.

(*i*) *R. v. West Riding County Council*, [1906] 2 K. B. 676, 716.

(*k*) [1922] 2 A. C. 339. See also *Att.-Gen. v. Brown*, [1920] 1 K. B. 773, 793, where Sankey, J., made use of the history of the King's Prerogative in construing section 43 of the Customs Consolidation Act, 1876.

(*l*) *Chorlton v. Lings* (1868), L. R. 4 C. P. 374; *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79; *Nairn v. University of St. Andrews*, [1909] A. C. 147. See *Edwards v. Att.-Gen. of Canada*, [1930] A. C. 124.

(*m*) (1560), 1 Plowden pp. 199 and 203—205. Cf. *Claim of Viscountess Rhondda*, [1922] A. C. 339, 370, Lord Birkenhead.

(*n*) [1900] 1 Ch. 718, 725, *R. v. Paddington and St. Marylebone Rent Tribunal* (1949) 65 T. L. R. 200, 203.

"In construing any enactment regard must be had not only to the words used but to the history of the Act and the reasons which led to it being passed. You must look to the mischief which had to be cured as well as to the cure provided."

The principle of the admissibility of general history as an aid to interpretation was fully explained by Lord Halsbury in *Read v. Bishop of Lincoln* (o), where his Lordship pointed out that the meaning of the terms of the Rubric can only be properly ascertained by being considered in relation to the circumstances existing at the time it was framed, and that works of authority on ecclesiastical history and practices might properly be consulted to ascertain those circumstances. The same circumstances ascertained in a similar way might doubtless be taken into consideration to ascertain the meaning of an old Act of Parliament.

Local history to aid interpretation of local Acts, etc. So, too, in considering the meaning of a local Act or a section in a general Act dealing with particular local matters, the state of things existing at the time of the passing of the Act, as showing the circumstances in which it was passed, may properly be considered, as was done by the Court of Queen's Bench in *R. v. Dean of Hereford* (p), in *Green v. The Queen* (q), and *Mayor of Manchester v. Lyons* (r). In *Herron v. Rathmines and Rathgar Improvement Commissioners* (s), Lord Halsbury said: "The subject matter with which the Legislature was dealing and the facts existing at the time with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act"; and he went on to consider the local facts with relation to which the local Act under consideration was passed.

Debates in Parliament. It is not permissible, however, in discussing the meaning of an obscure enactment, to refer to "the parliamentary history" of a statute, in the sense of the debates which took place in Parliament (t) when the statute was under consideration. As was said

(o) [1892] A. C. 644, at pp. 652, 653, 665.

(p) (1870), L. R. 5 Q. B. 196, 201.

(q) (1876), 1 App. Cas. 513, 531.

(r) (1882), 22 Ch. D. 287, 302.

(s) [1892] A. C. 498, 502.

(t) In *R. v. Bishop of Oxford* (1879), 4 Q. B. D. 525, Bramwell and Baggallay, L.JJ., allowed a speech of the Lord Chancellor in the House of Lords to be cited as an authority as to the construction of a statute. And in *S. E. Ry. v. Railway Commissioners* (1880), 5 Q. B. D. 217, 236, Cockburn, C.J., said: "Where the meaning of an Act is doubtful, we are, I think, at liberty to recur to the circumstances under which it passed into law as a means of solving the difficulty"; and he accordingly proceeded to quote a speech made by Mr. Cardwell on the introduction of the Bill into the House of Commons, and a speech made by the Lord Chancellor on introducing it into the House of Lords. These decisions are inconsistent with the cases cited in the text, and the first was disapproved by Earls Cairns and Selborne in *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214. See also, as to the doubtful propriety of referring, for the construction of a statute relating to a colony, to the speech of a Secretary of State in introducing it in Parliament, *Smiles v. Belford* (1877), 1 Upp. Can. App. 436, 445, Burton, J.A.; 451, Moss, J.A.; *Gosselin v. R.* (1903), 33 Canada S. C. 255, 264, Davies, J.; 268 Taschereau, J. (exceptions to rule). And the view expressed in *Canadian Wheat Board v. Manitoba Pool Elevators*, [1948] 2 D. L. R. 726, that speeches in Parliament are inadmissible.

by Willes, J., in *Millar v. Taylor* (u): "The sense and meaning of an Act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House or to the Sovereign." The alterations made in it during its passage through Committee (x) are, as the Court said in *R. v. Hertford College* (y), "wisely inadmissible to explain it." In *Herron v. Rathmines, etc., Commissioners* (z), Lord Halsbury, L.C., said, with reference to the construction of a local Act: "I very heartily concur in the language of FitzGibbon, L.J., that 'we cannot interpret the Act by any reference to the Bill, nor can we determine its construction by any reference to its original form.'"

In *Administrator-General of Bengal v. Prem Lal Mullick* (a), the Judicial Committee, per Lord Watson, said: "Their lordships observe that the two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgment on them, refer to the proceedings of the Legislature which resulted in the passing of the Act (No. II) of 1874 as legitimate aid in the construction of section 31. Their lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian statute." More recently Lord Wright in the Privy Council said: "It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted" (b).

The same rule is adopted in Canada (c). In Australia it has been ruled that the debates in the Federal Convention which framed the Commonwealth Constitution afterwards brought into force by Imperial legislation cannot be used for the interpretation of the Constitution (d).

Reports of Commissioners. As to reports of Commissioners it is now settled that these are inadmissible as aids to construction when the intention of a statute is in question. The weighty opinion of Lord Wright had already been quoted above and Lord O'Hagan in 1880

(u) (1769), 4 Burr. 2303, 2332.

(x) See *Att.-Gen. v. Sillem* (1863), 2 H. & C. 431, 521, per Pollock, C.B.; and *R. v. West Riding County Council*, [1906] 2 K. B. 670, 676, per Farwell, L.J. Cf. *Holme v. Guy* (1877), 5 Ch. D. 901, 905, Jessel, M.R.

(y) (1878), 3 Q. B. D. 693, 707.

(z) [1892] A. C. 498, 502.

(a) (1895), L. R. 22 Ind. App. 107, 118.

(b) *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners*, [1935] A. C. 445, at p. 458.

(c) In *Gosselin v. R.* (1903), 33 Canada S. C. 255, 264, the relevance of debates as a guide to interpretation is fully discussed by Taschereau, J., and the authorities are collected.

(d) *Sydney Municipal Council v. Commonwealth* (1904), 1 Australia C. L. R. 208, 213. It was argued that the Federalist had been referred to in the Courts of the United States—"That is an expert opinion or a text-book," O'Connor, J.

referred to such reports which he considered "scarcely legitimate guides to the construction of the statute" (e). Lord Wright in his judgment in the *Assam Case* (b) referred to *Eastman Photographic Materials Co. v. Comptroller-General of Patents* (f) where Lord Halsbury in his opinion in the House of Lords had said that for the purpose of construing the Patents Act, 1888, reference could be made to the report of a commission appointed in 1887 to inquire into the duties, arrangements, etc., of the Patent Office under the Patents, etc., Act, 1883. This had been thought to give support to the admissibility of these reports, but Lord Wright said in the *Assam Case*: "The Lord Chancellor was there referring to the report of a commission which had sat to inquire into the working of the earlier Act, which had been superseded by the Act actually being construed by the House, but Lord Halsbury refers to the report not directly to ascertain the intention of the words used in the Act, as he says 'no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission.' Lord Halsbury, it is clear, was treating the report as extraneous matter to show what were the surrounding circumstances (g), with reference to which the words were used, so that the case came within the principle stated by Lord Langdale," which he stated in the case of *Gorham v. Bishop of Exeter* (h), as follows "we must endeavour to attain for ourselves the meaning of the language employed (in Articles and Liturgy), assisted only by the consideration of such external or historical facts as we may find necessary to make us to understand the subject-matter to which the instruments relate and the meaning of the words employed."

Memoranda prefixed to Bills. The memorandum or breviat now usually prefixed to Bills of considerable importance, and especially to consolidation Bills, often supplies useful hints as to the intention of the draftsman, but has not so far been adopted as an aid to the Court in construing the Act when passed.

(e) *Rankin v. Lamont* (1880), 5 App. Cas. 44, 52. Except *Fellowes v. Clay* (1843), 4 Q. B. 313, at p. 356, in which Lord Denman referred to the Report of the Real Property Commissioners, none of the earlier cases countenance reference to such Reports. In *Salkeld v. Johnson* (1846), 2 C. B. 749, and *Farley v. Bonham* (1861), 30 L. J. Ch. 239, reference was not allowed to Reports of the Real Property Commissioners. In *Martin v. Hemming* (1854), 18 Jur. 1002, and *Arding v. Bonner* (1856), 2 Jur. (N.S.) 763, the Report of the Common Law Commissioners was rejected; and in *Ewart v. Williams* (1854), 3 Drew. 21, that of the Chancery Commissioners was also rejected. In *R. v. Bishop of Oxford* (1879), 4 Q. B. D. 525, the Court considered that the Church Discipline Act, 1840, might be "looked at by the light of the Report of the Ecclesiastical Courts Commissioners which preceded it." (On appeal sub nom. *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214.) In *Curran v. Treleaven*, [1891] 2 Q. B. 545, 557, the Report of a Royal Commission was referred to as elucidating the intentions of the Legislature with reference to the law of conspiracy; and see *R. v. Bishop of London* (1890), 24 Q. B. D. 213, cf. p. 121 note (i) ante.

(f) Cf. *Fletcher Moulton, L.J.*, in *Macmillan v. Dent* [1907], 1 Ch. 101, 120.

(h) E. F. Moore: The case of *Rev. G. C. Gorham against Bishop of Exeter*, 1852, p. 462, (1850) 14 Jur. 443.

Administrative practice before the Act. Usually, no doubt, the views of a Government Department as to the meaning of a statute which is administered by them are not admissible as an aid to construction; but it has been suggested by Lord Macnaghten that in special circumstances they may be. In discussing the meaning of the expression "charitable purposes," in section 61 of the Income Tax Act, 1842 (by which allowances in respect of income tax were granted on the rents and profits of lands vested in trustees for charitable purposes), Lord Macnaghten said (i): "I cannot help reminding your lordships, in conclusion, that the Income Tax Act is not a statute which was passed once for all. It has expired, and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act. It is impossible to suppose that on every occasion the Legislature can have been ignorant of the manner in which the tax was being administered by a department of the State under the guidance of their legal advisers, especially when the practice was fully laid before Parliament in the correspondence to which I have referred (k). It seems to me that an argument in favour of the respondent might have been founded on this view of the case. The point, of course, is not that a continuous practice following legislation interprets the mind of the Legislature; but that when you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment."

Light thrown upon meaning of statute by other statutes.

2. In considering what light one statute may throw upon the meaning of another statute, it is necessary to ascertain what assistance may be derived, firstly, from statutes which are *in pari materia* with the statute under consideration (l); and secondly, from earlier statutes not precisely *in pari materia*, but in some way relating to or affecting the same subject-matter, bearing in mind "that," as was said in *Escott v. Mastin* (m), "the same enactment of a statute (or the same direction in a rubric) may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter which has already been made the subject of enactment, and that this is most specially the case where the posterior enactment deals with the matter without making any reference to the prior enactment." And thirdly, it must be seen what

(i) *Commissioners of Income Tax v. Pemsel*, [1891] A. C. 531, at pp. 590, 591.

(k) The correspondence referred to is in Parliamentary Paper ("Charities" 1865), being correspondence between the Board of Inland Revenue as Special Commissioners of Income Tax and the Treasury, on the subject of Income Tax on Charities. See *l. c.*, pp. 589, 590.

(l) Cf. *Moran v. Commissioner of Taxation* (N. S. W.), [1940] A. C. 838.

(m) (1842), 4 Moore P. C. 104, 123.

assistance may be derived from subsequent statutes as being what is called "parliamentary expositions" of prior statutes.

In the interpretation of statutes the Courts decline to consider other statutes proceeding on different lines and including different provisions, or the judicial decisions thereon (*n*). Thus in *Re Lord Gerard's Settled Estate* (*o*), the Court of Appeal held that the Settled Land Acts formed a code applicable to the subject-matter with which they dealt, and that a decision on the Lands Clauses Act, 1845, was not applicable for their interpretation, because that Act was passed *alio intuitu*, and dealt with a different subject-matter. Lord Macnaghten, when discussing the phraseology of two Revenue Acts, said in *Inland Revenue Commissioners v. Forrest* (*p*): "The two Acts differ widely in their scope; and even when they happen to deal with the same subject their wording is not the same. It was argued, indeed, that the language was 'practically identical'; but that expression, to my mind, involves an admission that the language is different" (*q*).

In *Grand Trunk Rail. Co. v. Washington* (*r*), which turned on the meaning of an Act of the Dominion of Canada (51 Vict. c. 29), Sir Henry Strong said: "The decision of the Court of Appeal (of Ontario) seems to have been influenced by contrasting the Act of Parliament with certain statutes enacted by the Legislature of Ontario for the regulation of provincial railways. As these are enactments emanating from a different legislative body from that which passed the statute to be interpreted, and cannot be said to be *in pari materia* with that, their lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively upon the Dominion Act, and relating only to Dominion railways." In Canada, United States statutes as to grants of swamp lands have been held to be no guide in construing a Canadian statute on the same subject (*s*).

(a) *Statutes in pari materia*. Where Acts of Parliament are *in pari materia*, that is to say, are so far related as to form a system or code of legislation, the rule as laid down by the twelve Judges in *Palmer's Case* (*t*), is that such Acts "are to be taken together as forming one

(*n*) *Knowles & Sons v. L. & Y. Ry.* (1889), 14 App. Cas. 248, 253, Lord Halsbury. He had been asked to consider the Railways Clauses Act, 1845, as an aid to construing 31 Geo. 3, c. lxxvii (a private canal Act).

(*o*) [1893] 3 Ch. 252.

(*p*) (1890), 15 App. Cas. 334, 353.

(*q*) So in *Kydd v. Liverpool Watch Committee*, [1908] A. C. 327, 330, a case as to the jurisdiction of quarter sessions under the Police Act, 1890, Lord Loreburn, L.C., declined to consider decisions relating to a different Court, a different Act, and a different subject-matter.

(*r*) [1899] A. C. 275, at p. 280. Cf. as to Dominion and Colonial Taxing Statutes, *Armstrong v. Estate Duty Commissioners*, [1937] A. C. 885, at p. 896, *per* Lord Maugham; and *Att.-Gen. for Ontario v. Perry*, [1934] A. C. 477 at p. 487, *per* Lord Blanesburgh.

(*s*) *Att.-Gen. of Manitoba v. Att.-Gen. of Canada* (1904), 34 Canada S. C. 282, 314, Davies, J.

(*t*) (1784), 1 Leach C. C. (4th edit.) 355.

system, and as interpreting and enforcing each other" (u). In the American case of *United Society v. Eagle Bank* (x), Hosmer, J., said: "Statutes are *in pari materia* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the word *similis*. It is used in opposition to it, as in the expression *magis pares sunt quam similes*, intimating not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws made at different times and in reference to the same subject."

As Knight-Bruce, L.J., said in *Ex p. Copeland* (y), upon a question of construction arising "upon a subsequent statute on the same branch of the law, it is perfectly legitimate to use the former Act, though repealed." "For this," continued he, "I have the authority of Lord Mansfield, who in *R. v. Loxdale* (z), thus lays down the rule, 'Where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other'" (a).

What statutes are in pari materia. In *Crosley v. Arkwright* (b), Buller, J., said that all Acts relating to such a subject as stamps must be construed *in pari materia*. In *R. v. Loxdale* (c), Lord Mansfield said that the laws concerning Church leases, and those concerning bankrupts, also all the statutes providing for the poor, are to be considered as one system (d). In *Davis v. Edmondson* (e), it was held that all statutes making provisions as to the certificate to be taken out by solicitors were *in pari materia*. In *Redpath v. Allan* (f), it was held that certain Canadian statutes relating to pilotage were *in pari materia*. And in *Re Foster* (g), it was held that section 28 of the Regulation of Railways Act, 1873, was *in pari materia* with Order LV

(u) Ilbert, p. 250, speaks of "the rule that an Act may be interpreted by reference to other Acts dealing with the same or a similar subject-matter. Hence the language of these Acts must be studied. The meaning attached to a particular expression in an Act, either by definition or by judicial decision, may be attached to it in another, and variation of language may be construed as indicating change of intention." See *City of Ottawa v. Hunter* (1900), 31 Canada 7, 10, Taschereau, J.

(x) (1829), 7 Conn. 457, 470.

(y) (1852), 22 L. J. Bank. 17, 21.

(z) (1758), 1 Burr. 445, 447.

(a) In *Perth Local Board v. Maley* (1904), 1 Australia C. L. R. 702, 715, Griffith, C.J., said: "It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with; and when we find that such a meaning has been constantly attributed to the word 'necessary' in other Acts dealing with similar matters, they may have reasonably expected that the word would in this Act be construed as having the same meaning. Against that construction no authorities have been cited."

(b) (1788), 2 T. R. 603, 609.

(c) *Supra*.

(d) Cf. *Doe d. Tennyson v. Lord Yarborough* (1822), 1 Bing. 24; *Bayly v. Murin* (1673), 1 Vent. 244; *Duck v. Addington* (1791), 4 T. R. 447, as to hackney-carriage Acts.

(e) (1803), 3 B. & P. 382.

(f) (1872), L. R. 4 P. C. 518.

(g) (1881), 8 Q. B. D. 515, 522.

of the Rules of the Supreme Court, as they both gave power to judicial tribunals with regard to costs. But in *Moore's Case* (h), it was held that a statute which prohibited the execution of a warrant on a Sunday was not *in pari materia* with a subsequent statute which regulated the arrest of escaped prisoners. In *Howden v. Rocheid* (i), it was observed by Lord Colonsay that the mere fact that ancient statutes are contemporaneous will not entitle them to be used as explanatory of one another.

In a recent case *Evershed, L.J.*, said: "It is a rule of interpretation of statutes that it is permissible to call in aid for the construction of words or phrases used in one Act, meanings given to them in an earlier Act *in pari materia*. . . . The Rent Restriction Acts cannot be regarded as *in pari materia* with the real property legislation of 1925, and counsel was unable to cite any instance where a word or phrase in one Act of Parliament, having either technical or non-technical import, was held to have the technical meaning supplied by a definition in another Act, not *in pari materia* with the first, without any cross-reference to the latter Act" (k). Therefore "purchasing" in paragraph (h) of schedule 1 to the Rent and Mortgage Interest Restriction (Amendment) Act, 1933, was held equivalent to "buying."

In *Mersey Docks and Harbour Board v. Henderson* (l), the portions of a private Act relating to tonnage dues upon export and import were construed by reference to the Customs Acts in force at the time when the private Act was passed, inasmuch as they create the machinery and regulate the trade and commerce of the country in respect of export and import, and are therefore those from which the Legislature would naturally adopt the phraseology when imposing dock rates in respect of trade in goods to and from a port.

Consolidating Acts. In construing a consolidation Act, prior statutes repealed but reproduced in substance are regarded as *in pari materia*, and judicial decisions on a repealed statute are treated as applicable to substantially identical provisions in the repealing Act. The true effect of consolidating Acts is to combine in a consecutive form the provisions scattered about the Statute-book in order to avoid repetitions and remove inconsistencies. The view in favour of so regarding consolidation Acts was taken in *Mitchell v. Simpson* (m), and has also been adopted by the House of Lords in *Smith v. Baker* (n),

(h) (1704), 2 Ld. Raym. 1208.

(i) (1869), L. R. 1 H. L. (Sc.) 550, 562.

(k) *Powell v. Cleland* [1948], 1 K. B. 262, 273.

(l) (1888), 13 App. Cas. 595.

(m) (1890), 25 Q. B. D. 183, per Lord Esher, M.R., at p. 188.

(n) [1891] A. C. 325, 349. See also *Hodgson v. Bell* (1890), 24 Q. B. D. 525, on s. 65 of the Act, following *Foster v. Usherwood* (1877), 3 Ex. D. 1, on the prior County Courts Act of 1867; per Chitty, J., in *Re Budgett, Cooper v. Adams*, [1894] 2 Ch. 557, 561; *Boyle v. Wilson*, [1907] A. C. 45, 55, where Lord Loreburn, L.C., held that a ruling decision on former Scottish Licensing Acts applied to the sections of the Licensing (Scotland) Act, 1903, which were echoes or adaptations of the former enactments and did not alter their sense. "The ruling decision of *Lundie v. Magistrates of Falkirk* (1890), (18 Rettie 60) decided under the old Acts, applies equally to the new."

where Lord Watson referred for the construction of section 120 of the County Courts Act, 1888, to the decision in *Clarkson v. Musgrave* (o), upon the terms of the repealed County Courts Act, 1875, and held that decision to be equally applicable to the Act of 1888. But earlier the same learned lord, in *Bradlaugh v. Clarke* (p), had said that it appeared to him "to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the Legislature intended to enact in their room and stead." The rule must be adopted with caution, for it is almost impossible in the process of consolidation to avoid some dislocation and change in the effect of the consolidated enactments. It can probably be only safely applied where the provisions of the repealed Act are substantially reproduced in the consolidating statute. In *Administrator-General of Bengal v. Prem Lal Mullick* (q), the questions for decision turned on the meaning of the India Act II of 1874. Lord Watson said: "The respondent maintained this singular proposition, that in dealing with a consolidating statute each enactment must be traced to its original source, and when that is discovered must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act was passed" (r).

In *R. v. Riley* (s), it became necessary to determine the meaning of the word "instrument" in section 38 of the Forgery Act, 1861. It was pointed out by Hawkins, J., that throughout the statute the Legislature attached no rigid, definite meaning to the word and that it was used in a variety of senses, and Vaughan Williams, J., described the Act as a consolidating and amending Act in which "the greater part of the sections are culled from older statutes and put, as it were, on a statutory file. In construing such sections I do not think one ought to let the meaning of one section affect the construction in another unless the sections are plainly connected."

Act to be construed as one with another Act. It is now a common practice to insert clauses which make certain Acts one for purposes of construction, i.e., certain Acts are to be read *with* another Act or Acts (t). For instance, the Sale of Food (Weights and Measures) Act, 1926, is by section 15 (1) of that Act to be read as one with the Weights and Measures Acts, 1878–1926, including the Weights and

(o) (1881), 9 Q. B. D. 386.

(p) (1883), 8 App. Cas. 354, 380, quoted in *Tumahole Bereng v. R.*, [1949] A. C. 253, 266, Lord Macdermott.

(q) (1895), L. R. 22 Ind. App. 107, 116.

(r) *Wakanui Road District v. Hampstead Town Board* (1907), 27 N. Z. L. R. 469, 480; *Bennet v. Minister for Public Works* (1908), 7 Australia C. L. R. 372.

(s) [1896] 1 Q. B. 309, 316, 323.

(t) *E.g.* cf. the Merchant Shipping Act, 1906, which is to be read as one with the Merchant Shipping Act, 1894.

Measures Act, 1889. The defendant had been convicted under the Act of 1889 (u) for delivering coal in less quantity than that shown on the weight ticket required by section 21(2) of that Act. The defendant contended that his conviction was bad as he had not been served with notice of the prosecution as required by section 12 (6) of the Act of 1926, under which the defendant came as a retailer. Although one of the sections dealt with coal and the other with food, there was held to be no discrepancy and as the defendant had not been served with notice his conviction was bad.

The effect of enacting that an Act shall be construed as one with another Act is that the Court must construe every part of each of the Acts "as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has, to some extent, modified something found in the earlier Act" (x), or that from internal evidence the reference of the later to the earlier Act does not effect a complete incorporation of the provisions of the two Acts.

In *Mather v. Brown* (y), the question arose how far the provisions of the now repealed Municipal Corporations Act, 1835, were incorporated in the Municipal Elections Act, 1875, by virtue of section 13 of the latter Act, which says: "This Act, so far as consistent with the tenor thereof, shall be construed as one with the [former] Act and the Acts amending it." Section 142 of the earlier Act contained provisions for amending inaccuracies, and it was vainly contended that this section applied to inaccuracies in nomination papers under the later Act. Lord Coleridge said: "These terms [those of section 142] do not seem to me to extend the operation of the amending section in the earlier Act to a document which had no existence then, and therefore could not have been in the contemplation of the Legislature." And Lindley, J., added: "I have examined the authorities to see if they would supply any reasoning by which we might get over this objection. But I have found nothing to support the petitioner's view. On the contrary, I have found two cases which look the other way, showing that a mere incorporation by reference of a former Act does not extend all the provisions of the earlier to the later Act. These are *Lane v. Bennett* (z), and *Davison v. Farmer*" (a). But in *Norris v. Barnes* (b), the Court held, in construing the repealed Nuisances Removal Act of 1855 and Sanitary Act of 1866, which were to be construed as one, that section 44 of the earlier Act must apply to nuisances under the later Act (c).

(u) *Phillips v. Parnaby*, [1934] 2 K. B. 299, cf. the remarks of Lord Hewart, C.J., on the obscurity caused by legislation by reference, *ib.* p. 304: *Charing Cross Electric Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

(x) *Canada Southern Rail. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723, 727, Earl of Selborne, L.C. Cf. *Att.-Gen. v. Leicester Corporation*, [1910] 2 Ch. 359, 369 Neville, J.

(y) (1876), 1 C. P. D. 596, 601, 602.

(z) (1836), 1 M. & W. 70.

(a) (1851), 6 Ex. 242.

(b) (1872), L. R. 7 Q. B. 537.

(c) Cf. *Blades v. Lawrence* (1874), L. R. 9 Q. B. 374.

Prosecutions for offences against 2 & 3 Vict. c. 12, could by section 4 be commenced only by the Attorney-General, and section 6 enacted that that Act should be construed as one Act with 39 Geo. 3, c. 79. In *R. v. Johnson (d)*, the question arose whether, in consequence of the enactment contained in section 6, a conviction under 39 Geo. 3, c. 79, was bad if the prosecution had not been instituted by the Attorney-General. The Court held that it was not bad, and with regard to the enactment of section 6, Lord Denman, C.J., said as follows: "I do not well know what was intended by the enactment that 39 Geo. 3, c. 79, should be construed as one Act with 2 & 3 Vict. c. 12. This, however, is an offence against 39 Geo. 3, c. 79. . . . If the 2 & 3 Vict. c. 12, had not created any fresh offence, there might have been some ground for the argument now urged."

Decisions on statutes in pari materia. In *R. v. Mason (e)*, the question was whether an indictment under 30 Geo. 2, c. 24, for obtaining money by false pretences was good if it did not show what false pretences were. It appeared that it had been held in *R. v. Munoz (f)*, that an indictment for procuring a promissory note by false tokens under 33 Hen. 8, c. 1, was bad because it did not specify what the false tokens were. "30 Geo. 2, c. 24," said Buller, J., "only enlarges the description of the offence in the statute of Henry VIII. Both statutes are made *in pari materia*, and whatever has been determined in the construction of one of them is a sound rule of construction for the other. The judgment was arrested in the case in *Strange (f)* because the indictment did not specify the false tokens; therefore, by the same reason, an indictment on 30 Geo. 2, c. 24, which speaks of false pretences, must state what the false pretences are, otherwise the indictment is bad." "When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which had been so put upon them" (g).

In considering a question of liability for assessment to excess profits duty and the provisions of the Finance Acts, 1915–1920, Lord Sterndale, M.R., said: "I must treat this exposition in the Act of 1916 in the same way as if it had been given by a Court binding on me compelling me to construe the Act of 1915 in a way I could not otherwise have done" (h).

This rule also holds good with regard to a Dominion or colonial Act *in pari materia* with an English Act. In *Catterall v. Sweetman (i)*,

(d) (1845), 8 Q. B. 102, 106.

(e) (1788), 2 T. R. 581, 586. But subject to the caution given, p. 124 *ante*.

(f) (1739), 2 Str. 1127.

(g) *D'Emden v. Pedder* (1904), 1 Australia C. L. R. 91, 110, Griffith, C.J.; accepted as a correct rule in *Webb v. Outtrim*, [1907] A. C. 81, 89. Cf. *Chantler v. Chantler* (1906), 4 Australia C. L. R. 585, 591.

(h) *Cape Brandy Syndicate v. I. R. C.*, [1921] 2 K. B. 403, 415.

(i) (1845), 9 Jur. 951, 954.

Dr. Lushington said: "I must construe the Act of New South Wales . . . as an Act *in pari materia*. . . . And I conceive (though I know of no direct authority for the position) that an Act of a colonial Legislature where the English law prevails must be governed by the same rules of construction as prevail in England, and that English authorities upon an Act *in pari materia* are authorities for the interpretation of the colonial Act. I think it is true as a general principle" (j). This decision was approved by the Judicial Committee in *Trimble v. Hill* (k).

Statutes in pari materia not to be treated as one Act. But statutes which are *in pari materia* cannot, in the absence of specific provision to that effect, be treated precisely in the same way as if they were merely parts of one Act; a provision not found in an earlier Act cannot, in the absence of indication of clear intention, be imported into that earlier Act *in pari materia* (l). A good illustration of an illegitimate use of a statute *in pari materia* is *Casanova v. R.* (m), where it appeared that a foreign ship having been seized in a British harbour on suspicion of being engaged in the slave trade, and subsequently set at liberty again as the suspicion turned out to be groundless, application was made to the Admiralty Court of Sierra Leone for damages for wrongful seizure of the ship by virtue of section 35 of the Slave Trade Act, 1824. This enacted that "the prosecutors in such a case should pay such sums in the nature of costs and damages as the Court might decree when it appeared to such Court that the seizure was not justified by the circumstances of the case." The question therefore arose whether the seizure was justified or not. Now, it was proved that the suspicion had arisen from the fact that the ship had on board a very large number of empty water-casks. By a subsequent statute (5 & 6 Will. 4, c. 60) (1835, an Act for carrying into effect a treaty for suppressing the slave trade)—applying to the seizure of foreign vessels, not in British harbours (as this was), but on the high seas—it was enacted that the mere fact of an unreasonable number of water-casks being found upon a ship shall of itself be sufficient evidence to justify its seizure. The Judge of the Admiralty Court at Sierra Leone therefore decided that the seizure of this vessel was justified by this fact alone, and referred to this subsequent statute as enabling him to come to this conclusion, and he did not, as he should have done in accordance with the Act of 1824, take into consideration any other "circumstances of the case." The Judicial Committee reversed his judgment. "The learned Judge," said they (n), "refers to that statute

(j) See Part II, chap. ix, *post*.

(k) (1880), 5 App. Cas. 342. Cf. *Lovell & Christmas, Ltd. v. Commissioner of Taxes*, [1908] A. C. 46. But see *Grand Trunk Ry. v. Washington*, [1899] A. C. 275, *ante*, p. 125.

(l) Cf. *R. v. Johnson*, *supra*, p. 130. In *Blake v. Attersoll* (1824), 2 B. & C. 875, 882, Littledale, J., said: "Both Acts are *in pari materia* . . . therefore . . . the preamble of the first Act may be considered as virtually incorporated in the second Act." But it is very doubtful whether this rule can often safely be applied.

(m) (1866), L. R. 1 P. C. 268.

(n) *Ib.* p. 277.

(5 & 6 Will. 4, c. 60) as enabling him to arrive at the conclusion that the existence on board this ship . . . of an unusual quantity of water-casks is a circumstance of such grave suspicion as to justify the seizure. The learned Judge was not at liberty to use the rule of evidence introduced by that subsequent statute as applicable to the case before him. It was perfectly competent to him to refer to that statute as an Act that recognised the fact of having an unusual number of water-casks on board as a circumstance of suspicion, but the learned Judge was not at liberty to take that circumstance *per se*, as a Judge applying the Act of 5 & 6 Will. 4, c. 60, might have done. He was bound to take it in conjunction with all the other circumstances of the case."

(b) *Comparison with earlier statutes in pari materia.* Assistance in ascertaining the meaning of an enactment may be obtained by comparing its language with that used in earlier statutes relating to the same subject. But, as said by Lord Russell of Killowen, C.J., in *R. v. Titterton* (o), "it is proper to refer to earlier Acts *in pari materia* only when there is ambiguity." "It has been a general rule," said Blackburn, J., in *Hadley v. Perks* (p), "for drawing legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction." But in *Lawless v. Sullivan* (q), the Judicial Committee said that, "the employment of different language in the same Act may in some cases help to show that the Legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed." Acting on this principle, in *Alison v. Burns* (r), the Judicial Committee examined not only the sections of the Colonial Land Act, but also the previous legislation of the colony on the subject, in order to ascertain the policy and intention of the Legislature. If a statute, upon which a particular construction has been put in the past is re-enacted *ipsissimis verbis*, "this construction," as the Court said in *Mansell v. R.* (s), "must be considered to have the sanction of the Legislature" (t).

(o) [1895] 2 Q. B. 61, 67.

(p) (1866), L. R. 1 Q. B. 444, 457.

(q) (1881), 6 App. Cas. 373, 382, Sir Montague E. Smith.

(r) (1889), 15 App. Cas. 44, 51.

(s) (1857), 8 E. & B. 54, 73.

(t) In *Nicholls v. Cumming* (1877), 1 Canada 395, 425, Strong, J., said: "It is a cardinal rule in the construction of statutes that when a particular enactment has received a judicial interpretation, and the Legislature has afterwards re-enacted it, or one *in pari materia* with it, in the same terms, it must be considered to have adopted the construction which the Courts have applied," following Blackburn, J., in *Jones v. Mersey Docks & Harbour Board* (1864), 11 H. L. C. 443, 480.

Likewise, if Acts are framed using the forms of words or clauses in prior Acts which have received judicial construction, unless a contrary intention appears, the Courts will presume that the Legislature has adopted the judicial interpretation, or has used the words in the sense attributed to them by the Courts. "Where cases have been decided on particular forms of words in Courts and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Act showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them" (u). So in *Ex p. Campbell* (v), the words in section 216 of the Bankruptcy Act, 1861, were identical with those in section 16 of 5 Geo. 2, c. 30, which had been judicially construed in *Ex p. Vogel* (w), "I consider" said James, L.J., "that the Legislature in repeating these words in the Act of 1861 must be taken to have adopted the meaning put upon them by the Court of Queen's Bench."

Presumption from use of same language in later Act. It has been held that, where the Legislature has given to words a statutory definition in one statute, and has used the same words in a similar connection in a later statute dealing with the same subject-matter, it may be presumed, in the absence of any context indicating a contrary intention, that the same meaning attaches to the words in the later as is given to them in the earlier statute (x).

Presumption from use of different language in later Act. Conversely, if we find that the language employed by the Legislature in the earlier statutes on a particular subject has been departed from in a subsequent statute relating to the same subject, it is generally, but not always, (y) a fair presumption that the alteration in the language used in the subsequent statute was intentional (z). "Where two statutes," said Brett, J., in *Dickenson v. Fletcher* (a), "dealing with the same subject-matter use different language, it is generally a fair presumption that the alteration in the language used in the subsequent statute was intentional." But in *Wray v. Ellis* (b), Lord Campbell, C.J.,

(u) *Barlow v. Teal* (1884), 15 Q. B. D. 403, 404, 405, Coleridge, C.J., affmd. *ibid.* 501.

(v) (1870), L. R. 5 Ch. App. 703, 706.

(w) (1818), 2 B. & Ald. 219.

(x) *Lennon v. Gibson & Howes, Ltd.*, [1919] A. C. 709, 714, *per* Lord Shaw of Dunfermline, delivering the judgment of the Judicial Committee (definition of "sugar cane received"), cf. p. 136 *post*.

(y) For the exceptions, see p. 135 *post*.

(z) In *City of Ottawa v. Hunter* (1900), 31 Canada 7, 10, Taschereau, J., stated the rule thus: "When we see in Acts *in pari materia* by the very same Legislature words added to those used in a prior enactment, it would be setting at naught the clear intention of the Legislature to give the later enactment the construction judicially placed on the earlier enactment. To do so would be to read out of the statute expressions which must be held to have been deliberately inserted to make the new Act differ from the old"; see also *D. R. Fraser & Co. v. Minister of National Revenue*, [1949] A. C. 24, 33, *per* Lord Macmillan.

(a) (1873), L. R. 9 C. P. 1, 8.

(b) (1859), 1 E. & E. 276, 288.

said: "There can be little use in referring to cases where a similar question has arisen on Acts differently framed, for they only illustrate the general principle, which is not in dispute" (c). When an Act, though mainly a consolidation Act, is not wholly so, but introduces fresh words, judicial decisions upon the construction of the Acts which are being consolidated are no longer authorities and cannot affect the interpretation of the new Act. This doctrine was laid down with reference to one of the Criminal Law Consolidation and Amendment Acts of 1861 (d), in *Reed v. Nutt* (e). In *R. v. Jennings* (f), it being an indictable offence under 7 Will. 4 & 1 Vict. c. 85, s. 4, to "stab, cut, or wound" any person, it was held that under this statute a person could not be convicted unless the wound was inflicted by some instrument. But section 11 of the Offences against the Person Act, 1861, uses different language, and makes it indictable "by any means whatsoever to wound or cause any grievous bodily harm to any person," and accordingly it was held in *R. v. Bullock* (g), that this alteration in the language of the statute was intentional, and was made for the purpose of meeting the case of a wound inflicted otherwise than by an instrument, as, for instance, with the hand. The Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), s. 7, enacted that any witness who answered a question put to him by commissioners appointed to inquire into corrupt practices at an election, should "be entitled to receive a certificate stating that such witness was required by the commissioners to answer questions, the answers to which tended to criminate him, and that he had answered such questions." In *R. v. Price* (h), it was contended that under this section the commissioners had a discretion as to granting certificates of indemnity, and that they might refuse to grant such certificates if the questions had not in their opinion been satisfactorily answered. In support of this contention it was argued that 26 & 27 Vict. c. 29, s. 7, was in substance the same as that of 15 & 16 Vict. c. 57, ss. 9, 10, for which it had been substituted. It appeared, however, that the earlier statute merely enacted that "where any witness is examined by commissioners, such witness shall not be indemnified unless he receive from such commissioners a certificate. . . ." There was, therefore, a material difference between the language employed in the two statutes, "and when," said Cockburn, C.J., "the Legislature, in legislating *in pari materia* and substituting certain provisions for those which existed in an earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive."

(c) *Dictum* approved in *R. v. Titterton*, [1895] 2 Q. B. 61, 67, by Lord Russell of Killowen, C.J.; see also *Re McGreavey*, [1950] 1 A. E. R. 442, 446, Somervell, L.J.

(d) How far these Acts were intended to consolidate and to amend respectively is best ascertained by reference to the editions of the Acts published in 1861 by the late Mr. Greaves, Q.C., the draftsman of the Acts.

(e) (1890), 24 Q. B. D. 669 (a comparison of the words in 9 Geo. 4, c. 31, s. 27 and in 24 & 25 Vict. c. 100, s. 44; latter not a mere consolidation Act).

(f) (1838), 2 Lewin C. C. 130.

(g) (1868), L. R. 1 C. C. R. 115, 117.

(h) (1871), L. R. 6 Q. B. 411, 416.

Language may be altered without intending to alter meaning. But although, as has been said, this presumption is generally to be made, and "it is certainly to be wished," as the Judicial Committee said in *Casement v. Fulton* (i), "that, in framing statutes, the same words should always be employed in the same sense"; still, there are many instances to be found of the Legislature departing from language previously used for the purpose of conveying a certain meaning without intending to depart from that meaning. In *R. v. Buttle* (k), Kelly, C.B., said: "I think it was not the intention of the Legislature that a witness should be compelled to answer under pain of imprisonment and should then be exposed to an indictment for some perjury committed on another occasion and that his answers before the commissioners should be used in evidence at the trial of that indictment. This would be subversive of the principle of the common law." "When the Legislature," said Blackburn, J., "change the words of an enactment, no doubt it must be taken *prima facie* that there was an intention to change the meaning." This, however, is not necessarily so, for we find, as a matter of fact, that the same learned Judge observed in *Hadley v. Perks* (l), "in drawing Acts of Parliament, the Legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change" the words without intending to change the meaning. Thus, in *Re Wright* (m) Mellish, L.J., said, with regard to the departure in the Bankruptcy Act, 1869, from the language used in the repealed Bankruptcy Act, 1849: "Every one who is familiar with the present Act knows that the language of the former Acts has been very much altered in many cases where it could not have been intended to make any change in the law." In *Att.-Gen. v. Bradlaugh* (n), it was contended that the word "made" in the expression in the Parliamentary Oaths Act, 1866, "the oath shall be made" was to be construed as if it were different from the word "taken." "But," said Brett, M.R., "it seems to me, looking at the preamble, and at the manner in which the word is used, that the word 'made' has precisely the same effect as if it were 'taken.'" So in *Hopes v. Hopes* (o) the words "resides with" in s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and "cohabiting with" in s. 2 (2) of the same Act were held by the Court of Appeal to have the same meaning, differing from *Evans v. Evans* (p), where the rule of construction

(i) (1845), 5 Moore P. C. 130, 141.

(k) (1870), L. R. 1 C. C. R. 248, 251, 252. It was held that although the language of the later statute (26 Vict. c. 29, s. 7) was larger than the earlier (15 & 16 Vict. c. 57, s. 8), the latter was to be preferred. Cf. as to *dictum* quoted *infra* of Blackburn, J., *Wheatley v. Wheatley*, [1949] 65 T. L. R. 602 where "resides with" was held by the Divisional Court not to be used with the same meaning as "cohabitation" in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, ss. 1 (4) and 2 (2).

(l) (1866), L. R. 1 Q. B. 444, 457.

(m) (1876), 3 Ch. D. 70, 78.

(n) (1884), 14 Q. B. D. 667, 684.

(o) (1948) 64 T. L. R. 623, 626.

(p) [1948] 1 K. B. 175.

that if the draftsman used different words he presumably intended a different meaning was adopted. This is not a safe guide and the Court of Appeal pointed to the words of Blackburn, J., in *Hadley v. Perks* (*supra*, p. 125).

In *Lord Howard de Walden v. I. R. C.* (*q*), Lord Uthwatt said: "I agree with the Court of Appeal to the extent that the introduction of new words into an existing section may alter the meaning of words already there. But no such alteration can result unless, (1) the requirements of the English language demand it or, (2) those requirements permit it and the sense of the section demands it."

Presumption of intended alteration rebutted if statute carelessly drawn. In *Monteith v. McGavin* (*r*), Lord Cottenham said that "when Parliament provides for a particular mode of proceeding in one particular case, and makes no such provision in another case, it must not, as a general rule, be assumed that this arises from mere negligence or inattention in the framers of the Act." But, as Brett, M.R., said in *Nottage v. Jackson* (*s*), "persons who draw Acts of Parliament will sometimes use phrases that nobody else uses; consequently we do sometimes meet with expressions in statutes which we are compelled to believe were introduced, not for any specific purpose, but in consequence of the slovenliness of the draftsman." In *R. v. Buttle* (*t*) the Court held that there was no reason at all for altering the language used in the earlier statute which had *prima facie* been extended in the later Act, and that, as Kelly, C.B., said, "whoever framed the statute did it in a slovenly way, and showed great want of care in drawing it."

"So also, if it appears that the older statute contains words of surplusage, these words may very well be omitted in a subsequent Act without any intention on the part of the Legislature to alter the law. "It appears to me," said Mellish, L.J., in *Re Wood* (*u*) "that the framers of this [later] Act (Bankruptcy Act, 1869), thought it would be an improvement to omit words as to intent ("with intent to defraud or delay") in the cases where it was not necessary to prove such an intent, the words being then surplusage and misleading; and I think they may have been very properly left out without in any way altering the law." The learned Lord Justice concluded that by the omission of those words, there was no intention to alter the law as to fraudulent conveyances. Therefore, as Jessel, M.R., said in *Hack v. London Provident Building Society* (*x*), "it is the duty of the Court first of all to find out what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts when considering the construction of a plain statute framed in different

(*q*) [1948] 2 A. E. R. 825, 830.

(*r*) (1838), 5 Cl. & F. 473, 479.

(*s*) (1882), 11 Q. B. D. 627, 630.

(*t*) (1870) L. R. 1 C. C. R. 248, 250, p. 135 *ante*.

(*u*) (1872), L. R. 7 Ch. App. 302, 306.

(*x*) (1883), 23 Ch. D. 103, 108.

words from the former Acts." "Any other course," said the same Judge in *Ex p. Blaiberg* (y), "would be apt to lead us astray. If the later Act can clearly have only one meaning, we ought to give effect to it accordingly. But if, instead of doing this, we compare it with the former Act, and say that it differs from it to such and such an extent . . . and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."

Effect of section of earlier Act introduced into later Act. "Where a single section of an Act," said Lord Blackburn in *Mayor of Portsmouth v. Smith* (z), "is introduced into another [i.e., a subsequent] Act, it must be read in the sense which it bore in the original Act from which it was taken, and consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated into the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which was incorporated, that should be referred to; but all others, including the interpretation clause, if there be one, may be referred to."

(c) *Subsequent statutes relevant only as "Parliamentary exposition" of prior statutes.* Light may also be thrown upon the meaning of an Act by taking into consideration enactments contained in subsequent Acts (a). Sometimes an Act is passed for the express purpose of explaining or clearing up doubts as to the meaning of a previous Act, and is called "An Act of explanation." As to such Acts, Lord Coke has said, in *Butler and Baker's Case* (b), that such an Act "should not be construed by any strained sense against the letter of the previous Act, for if any exposition should be made against the direct letter of the exposition made by Parliament, there would be no end of expounding." So also in Cro. Car. 33, pl. 6, the Court said: "A statute of explanation shall be construed only according to the words, and not with an equity or intendment, for there cannot be an explanation upon an explanation."

But Acts of Parliament, without having been passed for the express purpose of explaining previous Acts, are sometimes spoken of as being "legislative declarations" or "parliamentary expositions"

(y) (1883), 23 Ch. D. 254, 258.

(z) (1885), 10 App. Cas. 364, 371.

(a) In *Morgan v. London General Omnibus Co.* (1883), 12 Q. B. D. 201, 207, Day, J., expressly withdrew an expression of opinion to which he had previously given utterance at p. 205, as to not "construing the language of an earlier by that of a subsequent one." Cf. *Gas Light & Coke Co. v. Hardy* (1886), 17 Q. B. D. 619, 621, Lord Esher, M.R. "I do not think it is strictly permissible to interpret a statute by reference to what has been done in subsequent statutes," Tucker L. J. in *Chandris v. Isbrandtsen-Moller Co.*, [1950] 2 A. E. R. 618, at p. 621. *Re Earl Fitzwilliam's Agreement*, [1950] Ch. 448, 459, Danckwerts, J.

(b) (1591), 3 Co. Rep. 25 a.

of the meaning of some earlier Act. Thus in *Battersby v. Kirk* (c), Tindal, C.J., said: "We cannot but consider these legislative enactments as forming a glossary for the proper interpretation of the expressions in the Bristol Dock Act which are considered to be left in doubt." In *Sandiman v. Breach* (d), the Court said: "The subsequent statutes, which contain regulations as to hackney coaches, are too ambiguous to be taken as legislative expositions of the former Acts." So again, in *Swift v. Jewsbury* (e), Lord Coleridge, C.J., said: "Whether one looks to the antecedent reason of the thing, or whether one looks to what may be called parliamentary exposition of the statute, upon both grounds it seems to me that the true construction is the one which has been contended for by the defendant." In *Grill v. General Screw Collier Co.* (f), the expression "wilful default" in section 299 of the repealed Merchant Shipping Act of 1854, was construed with reference to a similar expression in the Merchant Shipping Acts (Amendment) Act, 1862. But, as has been already pointed out (g) it is the Courts of law and not the Legislature, who are the authorised expositors of the statute law of the land, so that anything in the nature of a "parliamentary exposition" of an Act of Parliament is only an argument that may be prayed in aid of attaching some certain meaning to a statute and cannot be treated as *per se* conclusive.

But except as a parliamentary exposition, subsequent Acts are not to be relied on as an aid to the construction of prior Acts. It was laid down by A. L. Smith, J., in *Ward v. Folkestone Waterworks* (h), that a statute cannot be construed by the light of subsequent statutes. In this case an attempt had been made to construe the Waterworks Clauses Act, 1847, by reference to the Folkestone Water Act, 1888 (51 & 52 Vict. c. xxv). He said, "I must protest against an attempt to construe a statute by the light of an Act passed thirty years after its date." This attitude would seem to be erroneous in the light of the authorities quoted above and also of the following modern cases. In *Att.-Gen. v. Clarkson* (i), it was held that the Legislature had adopted in section 14 of the Finance Act, 1898, the construction put on section 5 (1) (a) of the Finance Act, 1894, by the decision in *Att.-Gen. v. Fairley* (k), and therefore that the question in the case under the Act of 1894 was answered by section 14 of the Act of 1898. In *Cape Brandy Syndicate v. I. C. R.* (l), Lord Sterndale, M.R., said: "I think it is clearly established in *Att.-Gen. v. Clarkson* (*supra*) that subsequent legislation may be looked at in order to see the proper construction

(c) (1836), 2 Bing. N. C. 584, 609. Tindal, C.J., was referring to 2 & 3 Wm. 4, c. 42; 3 & 4 Wm. 4, c. 27; 6 Geo. 4, c. 47 and 43 Geo. 3, c. 68.

(d) (1827), 7 B. & C. 96, 99.

(e) (1874), L. R. 9 Q. B. 301, 312.

(f) (1866), L. R. 1 C. P. 600.

(g) *Ante*, p. 11.

(h) (1890), 62 L. T. 321, 325.

(i) [1900] 1 Q. B. 156, 163, 164.

(k) [1897] 1 Q. B. 698.

(l) [1921] 2 K. B. 403, at p. 414.

to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation if it proceeded on an erroneous construction of previous legislation cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier." This passage was quoted with approval by Lord Buckmaster in *Ormond Investment Co. v. Betts (m)*, where Lord Atkinson said (n): "Sargant, L.J., seems to hold that a legislative interpretation of the statute of 1918 is to be found in this section 26 of the Act of 1924 and therefore the case comes within a well-recognised principle dealing with the construction of statutes, namely, that where the interpretation of a statute is obscure or ambiguous or readily capable of more than one interpretation, light may be thrown upon the true view to be taken of it by the aim and provisions of a subsequent statute." The rule would thus seem to have been approved by the House of Lords.

"More recently Evershed, M.R., referring to section 148 of the Lunacy Act, 1890, unamended by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 8, at the date of the judgment in the Court below, said: "We must decide this case according to the law as it was before this Act had been passed. . . . True we apply the law as it stood when the proceedings began but it does not follow that in construing section 148 of the Act of 1890, you may not be entitled to look at any parliamentary affirmation of any view of construction even though such affirmation is contained in a statute passed since the proceedings began" (o).

(d) *Local Acts*. Though a private or local Act may repeal to some extent a public general Act, the parliamentary history of local Bills usually excludes the inference that they were intended to explain or construe public general Acts (p).

Expositions of text-writers.

3. Light may also be thrown upon the meaning of an obscure enactment by the exposition of a statute by a text-writer of established repute (q), for "although," as Jessel, M.R., said in *Henty v. Wrey (r)*,

(m) [1928] A. C. 143 at p. 156.

(n) *Ibid.* at p. 164.

(o) *Re Westby's Settlement*, [1950] 1 Ch. 296 at p. 303.

(p) Occasionally, as in the case of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii), an Act introduced as a private Bill deals with a number of Acts included among the public general Acts, and "corporation" Acts not infrequently substitute a local for a general law so far as concerns the area legislated for.

(q) The authority of text-writers is of course very different. "Bacon's reading," said Erle, C.J., in *Heelis v. Blain* (1864), 18 C. B. (N.S.) 90, 108, "is entitled to very great respect. So Chief Baron Comyns, whose great work stands high in the estimation of every one in the profession." In *Ex p. Chick* (1879), 11 Ch. D. 731, a passage from Cicero was referred to on the construction of a statute, but Brett, L.J. (at p. 738), said: "To my mind to quote Cicero for such a purpose is too ambitious."

(r) (1882), 21 Ch. D. 332, 348.

"the text-books do not make law; they show more or less whether a principle has been generally accepted." Such expositions are often prayed in aid. "I should have no difficulty," said Jessel, M.R., in *Re Warner's Settled Estates* (s), "without the assistance of the text-writers; but it is very satisfactory to find they have considered it independently in the same way." In *Strother v. Hutchinson* (r), it was doubted whether, by 16 Edw. 1, c. 31, a bill of exceptions could be tendered to the Judge of a sheriff's court. "If we look only at the express words of the statute," said Tindal, C.J., "the question could not be argued, for the statute refers only to proceedings before the superior Courts. We must look, however, not only to the statute, but to the commentary of Lord Coke, which has been uncontradicted to the present day. . . . When we see the authority of so great a writer not only uncontradicted but adopted in all the digests and text-books, we can scarcely err if we adhere to his opinion." So in *Mayor, etc. of Newcastle v. Att.-Gen.* (u), the meaning of the words "all and every person and persons," as used in 39 Eliz. c. 3. was in question. Coke, in 2 Inst. 722, had explained these words as extending "to such bodies politic as may aliene," but that there had never been any judicial decision on the point. The appellants sought to disregard Lord Coke's opinion as being "an opinion written in a closet, off-hand, without any discussion, and not confirmed by any decision in Court." But the House of Lords unanimously adopted Coke's construction of the statute, Lord Lyndhurst, L.C., saying, "I do not think the House would feel justified in putting a construction on the Act inconsistent with the commentary of Lord Coke (x). If the meaning of some particular word in a statute is doubtful, "the expressions of text-writers, as evidencing the constant practice of the profession," as Lord Cairns said in *Alexander v. Kirkpatrick* (y), with regard to the construction of deeds, may very properly be taken into consideration, especially if there is no interpretation clause in the statute. Thus, in *R. v. Ritson* (z), the question to be decided was the meaning of the word "forge" in section 20 of the Forgery Act, 1861. Kelly, C.B., said: "When, however, we look at all these authorities and to the text writers of the highest reputation such as Comyns (Dig. tit. Forgery A. I), Bacon (abr. tit. Forgery A) and Coke (3 Inst. 169) we find there is no conflict of authority. Sir M. Foster (Foster's Criminal Cases, 116) Russell on Crimes (Vol. ii, p. 709, 10th ed.) and other writers all agree there is no definition of the word 'forgery' in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors and we think the case

(s) (1881), 17 Ch. D. 711, 713.

(r) (1837), 4 Bing. (N. C.) 83, 89.

(u) (1845), 12 Cl. & F. 402, 419.

(x) See also *Gorham v. Bishop of Exeter* (1850), 5 Ex. 630; *Wilmott v. London Road Car Co.* (1910), 27 T. L. R. 4 (C. A.).

(y) (1874), L. R. 2 H. L. (Sc.) 397, 400.

(z) (1869), L. R. 1 C. C. R. 200, 203. Cf. *Camden (Marquis) v. I. R. C.*, [1914] 1 K. B. 641, 647, Cozens-Hardy, M.R.

falls within their definitions." The Court then adopted the definition as laid down in the text-books on the subject.

Recently, Lord Goddard, C.J., referring to Bell's Sale of Food and Drugs for the meaning of the word "substance," said: "If a statement has appeared in a well-known text-book for a great number of years and has never been dissented from by a judicial decision, it would be most unfortunate to throw doubt on it, after it had been acted upon by justices and their clerks for so long" (a).

Practice of Conveyancers.

4. Courts of justice have always in the past paid great regard to the uniform opinion and practice of eminent conveyancers, which, as said by James, L.J., in *Re Ford and Hill* (b), "is to be looked upon as part of the common law" (c), and in *Basset v. Basset* (d), Lord Hardwicke gave as one of his reasons for a particular construction of 10 Will. 3, c. 22 (10 & 11 Will. 3, c. 16, Ruffhead), that before the passing of the Act the constant practice of all skilful conveyancers was to insert a limitation to preserve contingent remainders to posthumous children, and that ever since the Act they had omitted the clause, which the Chancellor regarded as a strong circumstance to show the uniform opinion of eminent conveyancers that the statute gave to the posthumous heir, not only the estate of his ancestor but the intermediate profits between the death of the ancestor and the birth of the heir. "The uniform opinion and practice of eminent conveyancers has always had great regard paid to it in all Courts of Justice." The Lord Chancellor also mentioned a case of dower (e), which he said had been determined on the opinion of conveyancers.

And when a construction in conveyancing law has become locally settled, e.g., in Scotland (f), or a British possession (g), the House of Lords and the Judicial Committee will not reject it by reference to ideas or conceptions prevailing in England and alien to and subversive of the foreign interpretation (h).

Construction long acquiesced in.

5. Light may be thrown upon the meaning of an obscure enactment by taking into consideration the construction which for a long period

(a) *Bastin v. Davies*, [1950] 1 A. E. R. 1095, 1096.

(b) (1879), 10 Ch. D. 365, 370.

(c) But the practice to be authoritative must be settled and uniform, and apparently also of old standing: see *Re Ford and Hill*, *ubi sup.*; *Elphinstone on Deeds*, 1885, p. 63 (g).

(d) (1744), 3 Atk. 203, 208.

(e) *Radnor (Countess) v. Vandebendy* (1686), Show. Parl. Cas. 69.

(f) *Kirkpatrick's Trustees v. Kirkpatrick* (1874), 1 Rettie H. L. (Sc.) 37, 42, Lord Cairns.

(g) *Natal Bank v. Rood*, [1910] A. C. 570.

(h) *Ib. per Lord Shaw*, p. 588.

of time (i) has been put upon it. “*Optima legum interpretis consuetudo*,” says Coke (k). “We did not think,” said the Court in *Cox v. Leigh* (l), “that the words of the statute (8 Anne, c. 14, s. 1) are sufficiently wide to justify us in putting a construction upon the statute different from that which has been entertained for 160 years.” And in *Gorham v. Bishop of Exeter* (m), Lord Campbell said: “Were the language obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long usage.” In *R. v. Cutbush* (n), the question arose whether justices have power, under section 25 of the Summary Jurisdiction Act, 1848, to sentence to imprisonment which is to commence at the expiration of an existing term of imprisonment. The enactment being similar to that of 7 & 8 Geo. 4, c. 28, s. 10, (Criminal Law Act, 1827), the Court, before arriving at a decision, “thought it important to ascertain what had been the practice of the Judges under the last-mentioned Act.” Upon ascertaining what had been the practice, they treated it as affording “a contemporaneous expression of the effect of 7 & 8 Geo. 4, c. 28, s. 10,” and accordingly held that the statute of 1848 must be construed in the same way.

In *Migneault v. Malo* (o), the question arose as to what was the effect of a Canadian statute passed in 1801, which enacted that, “whereas doubts have arisen touching the method now followed of proving wills before a Judge of the Courts of civil jurisdiction in the province; be it therefore enacted, that such proof shall have the same force and effect as if made and taken before a Court of Probate.” “At first sight,” said the Judicial Committee, “it certainly appeared to their lordships that this language availed to introduce the law of England with respect to the conclusiveness of a probate, duly granted, into the law of Canada. . . . This, moreover, appears to their lordships to be the true construction of the words ‘such proof shall have the same force and effect as if made and taken before a Court of Probate.’ Their lordships, however, think that they cannot consider this matter now as *res integra*. They cannot disregard the practice of the Canadian Courts with respect to it for the last seventy years. . . . It appears to their lordships that, by the uninterrupted practice and usage of the

(i) That is to say, “one or two centuries,” as Lord Watson said in *Clyde Navigation Trustees v. Laird* (1883), 8 App. Cas. 658, 673, on this subject. See p. 78, *ante*.

(k) 2 Co. Rep. 81. In 2 Co. Inst. 136, he says: “*Contemporanea expositio est fortissima in lege*”; and (1 Inst. 186 a) that *communis opinio* is “of good authority in law: a *communi observantia non est recedendum*.” See also note (69) by Hargrave, where it is said that this was the origin of the maxim, *Communis error facit jus*: a maxim which Lord Kenyon said he “would never resort to”: *R. v. Essex* (1792), 4 T. R. 591, 594. As to deeds, see Norton on Deeds (1928), p. 154; and as to documents generally, see *N. E. Ry. v. Lord Hastings*, [1900] A. C. 260, 269, *Lamb v. Goring Brick Co.*, [1932] 1 K. B. 710, 721, Greer, L.J.

(l) (1874), L. R. 9 Q. B. 333, 340. See also *Gaussen v. Lower Bann Navigation Trustees*, [1929] N. I. 11.

(m) (1850), 15 Q. B. 52 at p. 69.

(n) (1867), L. R. 2 Q. B. 379, 382.

(o) (1872), L. R. 4 P. C. 123, 137, 139.

Canadian Courts since 1801, the law has received an interpretation which does not affix to the grant of probate that binding and conclusive character which it has in England . . . their lordships therefore think that they ought not to advise Her Majesty that a different construction ought now to be put upon the law." Similarly, in *Evanturel v. Evanturel* (p), which turned upon the construction of Article 289 of the *Coûtume de Paris*, as declared by the Parliament of Paris in 1580, the Court said as follows: "It appears therefore to their lordships, that even if the French authorities were admitted to be in favour of the stricter construction of the article in question, the latter interpretation has, both by decision and long usage, acquired the force of law in Lower Canada."

In *Ohlson's Case* (q), in dealing with the interpretation of section 39 of the Pawnbrokers Act, 1872, Stephen, J., said: "What weighs with me very greatly in coming to the present conclusion is the practice of the Inland Revenue Commissioners for the past sixteen years. So long ago as 1874 this very point was decided by Sir Thomas Henry, for whose decisions we all have very great respect; and the least that can be said with regard to the case before him is that he pointedly called the attention of the commissioners to the case—the learned magistrate having offered to state a case—an offer refused by the commissioners, who by their refusal must be taken to have acquiesced in the decision. That is a very strong contemporaneous exposition of the meaning of the Act." This decision has been discussed and explained in *Ex p. Silvester* (r), which attempted to extend *Ohlson's Case*, and *Goldsmiths' Co. v. Wyatt* (s) in which Farwell, L.J., said, "but in our opinion the principle of *contemporanea expositio* cannot be applied to so modern a statute" as 12 Geo. 2, c. 26.

It is necessary to guard against confusing *contemporanea expositio* as applied to a statute, with the treatment of long usage as proof of a legal right under an ambiguous or lost grant.

In *Clyde Navigation Trustees v. Laird* (t), it was in dispute whether the Clyde Navigation Consolidation Act, 1858 (repealing eight prior Acts), imposed navigation dues on timber floated up the Clyde in logs chained together. From 1858 to 1882 dues had been levied on this class of timber without resistance from the owners; and some Judges in the Court of Session suggested that this non-resistance might be considered in construing the statute. On this Lord Blackburn said: "I think that [submission] raises a strong *prima facie* ground for thinking that there must exist some legal ground on which they [the owners] could not resist. And I think a Court should be cautious, and not decide unnecessarily that there is no such ground. If the Lord

(p) (1869), L. R. 2 P. C. 462, 488.

(q) [1891] 1 Q. B. 485, 489.

(r) [1907] 1 K. B. 108.

(s) [1907] 1 K. B. 95, 107.

(t) (1883), 8 App. Cas. 658, 670, Lord Blackburn; 673 Lord Watson, adopted by Farwell, L.J., in *Sadler v. Whiteman*, [1910] 1 K. B. 868 at p. 892.

President [Ingliš] means no more than this when he calls it ‘*contemporanea expositio* of the statutes which is almost irresistible,’ I agree with him. I do not think that he means that enjoyment at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true construction. If he did, I should not agree with him, for I know of no authority, and am not aware of any principle, for so saying.” On the other hand Lord Watson in the same case said: “I have only to add that in my opinion such usage as has in this case been called ‘*contemporanea expositio*’ is of no value whatever in construing a British statute of the year 1858. When there are ambiguous expressions in an Act passed two or three centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years by the unanimous consent of all parties interested as evidence of what must presumably have been the intention of the Legislature at that remote period. But I feel bound to construe a recent statute according to its own terms when these are brought into controversy, and not according to the views which interested parties may have hitherto taken.”

The same opinion was expressed by Cozens-Hardy, L.J., in *Assheton-Smith v. Owen* (u), a somewhat similar case of port dues, but Stirling, L.J., there said: “I will only add that the rates and dues were paid by the plaintiff’s predecessors in title in respect of ships laden or unladen at Port Dinorwic without dispute for a long period and down to a time shortly before bringing this action. This circumstance, though it may not preclude the plaintiff from questioning the right to levy rates or dues, yet as pointed out by Lord Blackburn in *Clyde Navigation Trustees v. Laird* (t) may well render the Court cautious in holding that such right did not exist.”

Usage.

6. *Usage disregarded if meaning plain.* It is important to bear in mind, as Grose, J., pointed out in *R. v. Hogg* (x), that although “where the words of an Act are doubtful, usage may be called in to explain them,” still that “usage ought not to be attended to in construing an Act of Parliament which cannot admit of different interpretations.” “Where,” said Lord Brougham, in *Magistrates of Dunbar v. Duchess of Roxburgh* (y), “a statute speaking on some points is silent as to others, usage may well supply the defect; for where the statute uses language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning and reduce that uncertainty to a fixed rule . . . but it is quite plain that against a plain statutory law no usage is of any avail.” And in *Northam Bridge Co. v. R.* (z), Chitty, J., held that neither usage nor

(u) [1906] 1 Ch. 179, 212, 213; *affd.* [1907] A. C. 124.

(x) (1787), 1 T. R. 721, 728.

(y) (1835), 3 Cl. & F. 325, 354.

(z) (1886), 55 L. T. 759.

long-continued practice for eighty years could render the Crown liable to pay bridge tolls from which it was exempted by the plain terms of the Post Office Management Act, 1837 (a).

Usage will not operate unless particular construction has been universally acquiesced in. Again, usage cannot be operative to interpret a statute unless it appears that the statute has been universally construed in a particular way. "If," said Lord Cottenham in *The Waterford Peerage Claim* (b), "there has been a course of decisions, and the decision first made has been adhered to and confirmed by other decisions, that is what is called a current of authorities too strong to be resisted. . . . I am not aware of any case in which a single decision, even of a Court of competent jurisdiction, having before it properly and judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute." Thus, in *Bank of Ireland v. Evans's Charities* (c), it appeared that it had been the usual, but not the universal, practice to make up the record when a bill of exceptions had been tendered in a particular way in accordance with what was supposed to be the meaning of 28 Geo. 3, c. 31 (Ir.). But the House of Lords, acting on the opinion of the Judges, held that this statute had been wrongly understood. "The answer to the question put to us," said the Judges, "depends wholly on the construction of the Irish Act of 28 Geo. 3, c. 31. We understand that in acting upon the statute in Ireland a practice has been prevalent, though not universal, which is at variance with our opinion as to its proper construction. We conceive that the meaning of the Act is so clear that we ought not to give any weight to the practice." Similarly, in *R. v. Hogg* (d), it was argued that a certain class of property in Rochester was not liable to be rated under section 1 of the Poor Relief Act, 1601, because it was not the custom of the town to rate that class of property. But this argument did not prevail. "We are," said Grose, J., "interpreting a universal law, which cannot receive different constructions in different towns. It is the general law that this kind of property should be rated, and we cannot explain the law differently by the usage of this or that particular place." He added that while an agreement among the inhabitants might bind them, it was no guide to the construction of the statute (e).

Construction of ambiguous statutes not disturbed if title or transactions founded thereon. *Stare decisis*.

7. Even in the case of a modern statute, if its meaning is ambiguous and a certain interpretation has been uniformly put upon it and

(a) 7 Will. 4 & 1 Vict. c. 33, repealed and re-enacted in 8 Edw. 7, c. 48. See s. 79

(b) (1832), 6 Cl. & F. 133, at p. 172. It had been argued that an opinion given by Coke and the two other Chief Judges of England, at the request of the Privy Council, upon the effect of the Irish Act, 28 Hen. 8, c. 3, ought to be conclusive, even though erroneous.

(c) (1855), 5 H. L. C. 389, 405.

(d) (1787), 1 T. R. 721, 728.

(e) See p. 74 *ante*, and *N. E. Ry. v. Lord Hastings*, [1900] A. C. 260, 268, Lord Davey.

transactions, such as dealings in property and the making of contracts have taken place on the faith of that interpretation, the Court will not put a different interpretation upon it which would materially affect those transactions—for *communis error facit jus* (f).

The rule is also founded more logically on the axiom *stare decisis*, of which the leading modern example is to be found in *Hanau v. Ehrlich* (g). The case turned on the ambiguous words in the Statute of Frauds as to agreements not to be performed within a year from the making thereof. The House of Lords in 1912 decided that though it may be well doubted if an agreement for more than one year determinable by notice within the year is within the statute, a long course of decisions going back to 1829 in the affirmative ought not to be disturbed. And more recently Scott, L.J. (h), refused to reverse a decision of Malins, V.-C., in 1870 (i), on the ground that the construction placed by the Vice-Chancellor on certain sections of the Companies Act, 1862, had been accepted for a long time.

In 1919 Lord Buckmaster enunciated the principles on which the rule of *stare decisis* is based. "Firstly, the construction of a statute of doubtful meaning once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience. Secondly, that the decisions upon which title to property depends or which by establishing principles of construction otherwise form the basis of contracts ought to receive the same protection. Thirdly, decisions affecting the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made or the position of the public materially affected, ought in the same way to continue" (k).

Earlier in *Morgan v. Crawshaw*, Lord Westbury had thus stated the rule (l). After explaining that it was unnecessary to examine the interest of a galee in iron ore mines, "because supposing it to be regarded as a tenement and not merely as an incorporeal right, I should still arrive at the conclusion that we must bow to the uniform interpretation which has been put upon the statute of Elizabeth and must not attempt to disturb the exposition it has received. . . . If we find a uniform interpretation of a statute upon a question materially affecting property, and perpetually recurring, and which has been

(f) *Re Tweeddale (Marquis)* (1793), 1 Anstr. 143. Similarly, we find that where there has existed for a long series of years a practice in a particular Court as to the inadmissibility of evidence of a certain character, the ultimate Court of Appeal will not alter such practice, although it appears that the practice was erroneous in its origin: *Janvrin v. De la Mare* (1861), 14 Moore P. C. 334.

(g) [1912] A. C. 39, 41. Cf. *Lucas v. Dixon* (1889), 22 Q. B. D. 357; *Tancred, Arrol & Co. v. Steel Co. of Scotland* (1890), 15 App. Cas. 125.

(h) *Re Warden & Hotchkiss Ltd.*, [1945] Ch. 270.

(i) *Re Union Hill Silver Co. Ltd.* (1870), 22 L. T. 400, followed in *Re Newcastle United Football Co. Ltd.*, [1932] W. N. 109.

(k) *Bourne v. Keane*, [1919] A. C. 815, at p. 874.

(l) (1871), L. R. 5 H. L. 304, 319-320. See also *per* Lord Fitzgerald in *Harding v. Howell* (1889), 14 App. Cas. 307, 315.

adhered to without interruption, it would be impossible for us to introduce the precedent of disregarding that interpretation. Disagreeing with it would thereby be shaking rights and titles which have been founded through so many years upon the conviction that that interpretation is the legal and proper one and is one which will not be departed from." In that case the House of Lords decided that iron mines and all other mines except coal mines were, under the Statute of Elizabeth (43 Eliz. c. 2, s. 1), exempt from liability to the poor rate. The statute mentioned coal mines only, and a long course of decisions had established that the rule *expressio unius est exclusio alterius* applied to the enactment.

The same rule was followed in *Associated Newspapers, Ltd. v. City of London Corporation* (m), where the House of Lords declined to overrule two old cases which established the non-rateability of certain property in the City of London on the construction of an Act of 1767, and in *Morgan v. Fear* (n), where the House of Lords refused to disturb a construction of the Prescription Act, 1832, which had been settled and acted on for forty-six years. In *Cohen v. Bayley-Worthington* (o), which turned on the construction of the Fines and Recoveries Act, 1833, the House of Lords refused to put on that Act a new construction, as property had been settled or otherwise dealt with for a long period of time on the faith of the older cases.

Limitations to the rule. The rule does not however apply when the earlier decisions have not been uniform. When that is the case the Court has to determine which current of authority should prevail and construe the statute accordingly (p). Nor can this rule of construction be applied when the meaning of a statute is plain and free from ambiguity (q).

In *West Ham Union v. Edmonton Union* (r), Lord Loreburn, L.C., said: "Great importance is to be attached to old authorities on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and that practical injustice is the consequence that must flow from them, I consider it is the duty of the House to overrule them, if it has not lost the right to do so by itself expressly affirming them" (s).

(m) [1916] 2 A. C. 429.

(n) [1907] A. C. 425.

(o) [1908] A. C. 97, 99.

(p) *Reid v. Reid* (1886), 31 Ch. D. 402, 410; *Jones v. Mersey Docks Harbour Board* (1864), 11 H. L. C. 443.

(q) *Ex p. Willey* (1883), 23 Ch. D. 118; *Hamilton v. Baker* (1889), 14 App. Cas. 209; *Emmerson v. Maddison*, [1906] A. C. 569.

(r) [1908] A. C. 1, 4.

(s) In this case of a pauper settlement the House overruled *R. v. Tipton* (1843), 3 Q. B. 215, in which a very narrow construction had been put on a Poor Law Act (13 & 14 Car. 2, c. 12). In *Dorking Union v. St. Saviour's Union*, [1898] 1 Q. B. 594, the C. A. had felt constrained to follow *R. v. Tipton*. The doctrine *stare decisis* is not acted upon by the Privy Council as strictly as by the House of Lords. *Nkambule (Gideon) v. R.*, [1950] A. C. 379, 397.

Furthermore, this rule is applicable only when transactions relating to property or contractual rights have been completed on the faith of a particular construction put upon a statute by earlier decisions (*t*). In *Pate v. Pate* (*u*), Lord Sumner in declining to follow earlier cases on the construction of a Ceylon Ordinance which had stood for 44 years said: "This is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb . . . nor is it in any case sound to misconstrue a statute for fear that in particular instances hardship may result. That is a matter for the Legislature, not for the Courts."

Subsequent legislation affected by decision as to construction. When a particular construction has been put upon an Act of Parliament and that construction may have affected the Legislature in subsequent legislation, the Courts will not disturb that construction unless it is clearly wrong. In *Lancashire and Yorkshire Ry. v. Bury Corporation* (*x*), a case upon section 46 of the Railways Clauses Consolidation Act, 1845, Lord Herschell said: "A construction was put upon the clause with which we are now dealing as long ago as 1858, and by very learned Judges of the Court of Queen's Bench (*y*). The view so taken was shortly afterwards approved and followed by the Court of Exchequer (*z*). And there are, as it seems to me, special reasons why a judgment so given should not be disturbed, unless it be clearly shown to have proceeded upon an erroneous view of the law, inasmuch as the clause which there received construction was contained in an enactment which did not of itself produce any legal results; it only had effect if incorporated by a subsequent Act of the Legislature in statutes giving powers to railway companies. And one cannot but see that the construction put upon an enactment of that description may well have affected the action of the Legislature in subsequent cases when they had to consider what obligations they should or should not impose upon the railway companies to whom they were giving powers. At the same time, if it could be established that the decision was manifestly erroneous, your lordships would be bound to give effect to that view, and to hold that the statute must be construed according to its natural meaning, notwithstanding the interpretation which had so long ago been put upon it by eminent Judges."

Reference to statutory rules made under the Act.

8. Where the language of an Act is ambiguous and difficult to construe, the Court may for assistance in its construction refer to rules made under the provisions of the Act, especially where such

(*t*) *Goldsmith's Company v. Wyatt*, [1907] 1 K. B. 108.

(*u*) [1915] A. C. 1100, 1108. Cf. *Robinson Bros. (Brewers) Ltd. v. Durham County Assessment Committee*, [1938] A. C. 321, 339, Lord Macmillan.

(*x*) (1889), 14 App. Cas. 417, 419; see also p. 158 *post*.

(*y*) *North Staffordshire Ry. v. Dale* (1857), 8 E. & B. 836.

(*z*) *Newcastle Turnpike Trustees v. North Staffordshire Ry.* (1860), 5 H. & N. 160.

rules are by the statute authorising them directed to be read as part of the Act.

For not only is every part of the statute itself to be taken into consideration in order to ascertain the meaning of any obscure expression, but "recourse may [also] be had to rules which have been made under the authority of the Act, if the construction of the Act is ambiguous and doubtful on any point, and if we find that in the rules any particular construction has been put on the Act, it is our duty to adopt and follow that construction" (a).

These rules form a sort of *contemporanea expositio*. But it is not clear whether they are to be deemed—

- (a) The practice of conveyancers;
- (b) Parliamentary exposition; or
- (c) Administrative exposition.

Rules made for the Courts by the Judges who are to administer them may be regarded as judicial expositions of the Act (b). But too much stress cannot be rested upon rules, inasmuch as they may be questioned as being in excess of the powers of the subordinate body to which Parliament has delegated authority to make them (c).

(a) *Per* James and Mellish, L.J., in *Ex p. Wier* (1871), L. R. 6 Ch. App. 875, 879. Cf. *Re Andrew* (1875), 1 Ch. D. 358; *Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508, 551, Lord Moulton.

(b) *Danford v. M'Annulty* (1882), 8 App. Cas. 456, 460, *per* Lord O'Hagan.

(c) Terms used in statutory rules made after 1889 are construed in the same way as the terms used in the statute authorising the making of the rules, unless a contrary intention appears; Interpretation Act, 1889, s. 31, *post*, Appendix B. As to the interpretation of such rules, see Bk. II, chap. iii, *post*.

CHAPTER V

INTERPRETATION OF WORDS

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Interpretation by context.

1. In approaching the question of interpreting words used in statutes it is necessary to keep in mind the presumption that words in a statute are strictly and correctly used (a). As Lord Hewart, C.J., said: "It ought to be the rule and we are glad to think it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning is to be preferred" (b). It is also necessary to remember the caution given by Lord Loreburn, L.C., in *Nairn v. University of St. Andrews* (c): "It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a

(a) Cf. *Law Society v. United Services Bureau*, [1934] 1 K. B. 343, and s. 2 of the Interpretation Act, 1889.

(b) *Spillers Ltd. v. Cardiff Assessment Committee*, [1931] 2 K. B. 21, 43; quoted with approval by Lord Macmillan in *New Plymouth Borough Council v. Taranak Electric Power Board*, [1933] A. C. 680, at p. 682.

(c) [1909] A. C. 147, 161.

single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression, and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes so imperfect and obscure as they often are."

The true mode of ascertainment is that said to have been first used by Sir Thomas More (*d*), viz., that words cannot be construed effectively without reference to their context.

Their meaning is to be ascertained by reference to the whole of the Act, including, if necessary, the preamble (*e*), and perhaps even the full title. "A statute must be read as a whole, therefore, the language of one section may affect the construction of another" (*f*). But now that Acts are divided into separate sections, each having effect as a substantive enactment without introductory words (*g*), the section in which the obscure words occur is first to be considered (*h*). It is only in a second or last resort that the rest of the statute, or the preamble, or the scheme or governing intention is to be regarded.

It is a well-established rule of grammar that the meaning of words depends largely, if not wholly, upon their collocation, and the canon of statutory construction is that the rules of grammar should be followed if possible. It is, however, by no means unusual for Parliament, by interpretation clauses, to alter the ordinary meaning of words.

Reference to dictionaries and interpretation clauses.

2. *Ordinary dictionaries.* Ordinary dictionaries are somewhat delusive guides in the construction of statutory terms. In *Midland Ry. v. Robinson* (*i*), the question arose whether the word "mine" in section 77 of the Railways Clauses Act, 1845, included beds or seams which could only be worked by open or surface operations. Lord Herschell had cited Dr. Johnson as defining a quarry to be a "stone mine." But Lord Macnaghten said: "I continue to think

(*d*) "Here I will remark, that no one ever lived who did not at first ascertain the meaning of words, and from them gather the meaning of the sentences which they compose—no one, I say, with one single exception, and that is our own Thomas More. For he is wont to gather the force of the words from the sentences in which they occur, especially in his study of Greek. This is not contrary to grammar, but above it, and an instinct of genius" (Pace, quoted in Bridgett's Life of More, p. 12).

(*e*) *Colquhoun v. Brooks* (1889), 14 App. Cas. 493.

(*f*) *Ilbert*, 250.

(*g*) Interpretation Act, 1889, s. 8, *post*, Appendix B. It is by virtue of this general rule that the Statute Law Revision Acts excise the words of enactment in Acts passed before 1850.

(*h*) *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 162, Jessel, M.R.

(*i*) (1889), 15 App. Cas. 19, 34

that the word [mine] was used both in the heading and in the section in the sense in which, if I am not mistaken, every English Judge who had occasion to consider the meaning of the word before *Farie's Case* (k) was decided, took to be its ordinary signification. It seems to me that on such a point the opinions of such Judges as Kindersley, V.-C., Turner, L.J., and Sir George Jessel are probably a safer guide than any definitions or illustrations to be found in dictionaries " (l).

No doubt reference to the better dictionaries does afford, either by definition or illustration, some guide to the use of a term in a statute. Lord Coleridge said, in *R. v. Peters* (m): "I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of Courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books." And in *Camden (Marquis) v. I. R. C.* (n), Cozens-Hardy, M.R., said: "It is for the Court to interpret the statute as best it may. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries." The definition of "park" in the Oxford English Dictionary has been approved and adopted by the Court (o), and Morton, L.J., adopted the meaning of "rubbish" given in the same work (p). The expression "working classes" has also received judicial interpretation (q).

Where terms of art are used, reference must be made to books which show the sense in which they were understood when the statute in question was passed. Thus, "political crime" was defined in *Re Castioni* (r), after considering Mill's and Stephen's discussions of its meaning. And "direct taxation" in the British North America Act of 1867 was determined by regard to works on political economy (s).

Interpretation clauses. The more modern statute contains, in the form of an interpretation clause, a little dictionary of its own, in which it endeavours to define, often arbitrarily, the chief terms used. Any ambiguity in the definition of such terms can rarely be solved otherwise than by examination of the statute itself, or other enactments

(k) *Provost, etc., of Glasgow v. Farie* (1888), 13 App. Cas. 657.

(l) For full discussion of the meaning of "mines" and "minerals" in statutes, see *G. W. Ry. v. Carpalla United China Clay Co.*, [1910] A. C. 83; *North British Ry. v. Budhill Coal and Sandstone Co.*, [1910] A. C. 116, 130.

(m) (1886), 16 Q. B. D. 636, 641.

(n) [1914] 1 K. B. 641, at p. 647.

(o) *Re Ripon Housing Order*, [1939] 2 K. B. 838.

(p) *McVittie v. Bolton Corporation*, [1945] 1 K. B. 281.

(q) *H. E. Green & Sons v. Minister of Health*, [1948] 1 K. B. 34, 38, per Denning, J.

(r) [1891] 1 Q. B. 149.

(s) *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, 581; *Brewers, etc., Association of Ontario v. Att.-Gen. for Ontario*, [1897] A. C. 231, 236.

with which it is to be read by reason of its subject-matter or the direction of the Legislature (r).

The Interpretation Act, 1889. The first attempt to introduce general statutory definitions, applicable to all Acts of Parliament, was made in 1850 by "An Act for shortening the Language used in Acts of Parliament." Section 4 of that Act provided that in all Acts of Parliament words importing the masculine gender should be deemed to include females (u), and the singular to include the plural, and that month should *prima facie* mean calendar month. The same section also contained statutory definitions of the expressions "County," "Land," "Oath," "Swear," and "Affidavit." That Act was repealed by the Interpretation Act, 1889, which re-enacted in substance the above section and provides a large number of additional statutory definitions applicable to all Acts passed after August 30, 1889. The Act is printed in full in Appendix B.

In every Act passed after April 12, 1927, "United Kingdom," unless the context otherwise requires, means Great Britain and Northern Ireland (x). In every Act of the United Kingdom passed after December 11, 1931, the expression "colony" does not include a Dominion (i.e., Canada, Australia, New Zealand, South Africa, Pakistan or Ceylon), or any Province or State forming part of a Dominion (y).

Construction of ordinary and technical terms and expressions.

3. (i) *According to their popular sense.* There are two rules as to the way in which terms and expressions are to be construed when used in an Act of Parliament. The first rule is that general statutes will *prima facie* be presumed to use words in their popular sense (z). This rule was stated by Lord Tenterden in *Att.-Gen. v. Winstanley* (a), "the words of an Act of Parliament which are not applied to any particular science or art" are to be construed "as they are understood in common language" (b). Critical refinements and subtle distinctions are to be avoided, and the obvious and popular meaning of the language should, as a general rule, be followed (c). Meticulous criticism must not be allowed to wreck an enactment (d). "It is

(r) See further pp. 197, *et seq. post.*

(u) For a review of the law as to incapacity of females and the inclusion of "woman" in "person," see *Edwards v. Att.-Gen. of Canada*, [1930] A. C. 124.

(x) The Royal and Parliamentary Titles Act, 1927, s. 2 (2). "Great Britain" includes Scotland but not Northern Ireland for the purposes of 21 and 80 (2) of the Criminal Justice Act, 1948; *R. v. Murphy* (1949), 65 T. L. R. 778, 779.

(y) The Statute of Westminster, 1931, ss. 1 and 11.

(z) *Clerical etc., Assurance Co. v. Carter* (1889), 22 Q. B. D., 444, 448, *per* Lord Esher, M.R.

(a) (1831), 2 D. & Cl. 302, 310.

(b) "*Uti loquitur vulgus*," as Dr. Lushington said in *The Fusilier* (1865), 34 L. J. P. M. & A. 25, 27.

(c) Bell, *Dict. Law of Scotland*, tit. Statute.

(d) *Per* Lord Robertson in *Shea v. Reid-Newfoundland Ry.*, [1908] A. C. 520, 525.

incumbent," said Willes, J., in *Mansell v. R.* (e), "on those who say that any word is a 'term of art,' for which no equivalent can be substituted, to show that it has been so held." In other words, as was said by Pollock, B., in *Grenfell v. Inland Revenue Commissioners* (f), if a statute contains language which is capable of being construed in a popular sense, such "a statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning, of course, by the words 'popular sense' that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it." But "if a word in its popular sense and read in an ordinary way is capable of two constructions, it is wise to adopt such a construction as is based on the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act and not to give any unnecessary powers" (g). In other words the construction of the words is to be adapted to the fitness of the matter of the statute. "I base my decision," said James, L.J., in *Cargo ex Schiller* (h), "on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan, and jetsam." Thus, in *Sherwood v. Ray* (i), it was held that the expression, "a suit which shall be depending at the time of the passing of this Act," as used in section 1 of Lord Lyndhurst's Act (the Marriage Act, 1835), was not to be understood as an equivalent for the technical term *lis pendens*, or "to be construed in any other than their ordinary and popular sense." And in *Att.-Gen. v. Bailey* (k), it was held that the word "spirits," being "a word of known import . . . is used in the Excise Acts in the sense in which it is ordinarily understood." "We do not think," said the Court "that, in common parlance, the word 'spirits' would be considered as comprehending a liquid like 'sweet spirits of nitre,' which is itself a known article of commerce not ordinarily passing under the name of 'spirits.'" So the popular or commercial sense has included illegitimate children in the expression "children" (l); "gas" (m); "Bohea tea" (n); "five miles square" (o); "grain" (p); "park" (q); "premises" (r); "rubbish" (s); "the

(e) (1857), 8 E. & B. 73, 109.

(f) (1876), 1 Ex. D. 242, 248.

(g) *Wandsworth Board of Works v. United Telephone Co.* (1883), 13 Q. B. D. 904, 919, Bowen, L.J.

(h) (1877), 2 P. D. 145, 161.

(i) (1837), 1 Moore P. C. 353, 395.

(k) (1847), 1 Ex. 281, 292.

(l) *R. v. Hodnett* (1786), 1 T. R. 96.

(m) *Stanley v. Western Insurance Co.* (1868), L. R. 2 Ex. 71.

(n) *Two Hundred Chests of Tea* (1824), 9 Wheat. 430.

(o) *Robertson v. Day* (1881), 5 App. Cas. 63, 69. Cf. p. 156 *post*.

(p) *Cotton v. Vogan*, [1896] A. C. 457.

(q) *Re Ripon Housing Order*, [1939] 2 K. B. 838.

(r) *Whitley v. Stumbles*, [1930] A. C. 544.

(s) *McVittie v. Bolton Corporation*, [1945] 1 K. B. 281.

working classes " (t); " gin " (u); " trailer " (v); " purchasing " (x); " Court " (y); have been similarly construed.

In construing a word in an Act caution is necessary in adopting the meaning ascribed to the word in other Acts. " It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone " (z).

The strict sense may mean the etymological or scientific sense as well as the legal or technical. As to the first, Grove, J., said in *Gordon v. Jennings* (a) (a case on the Wages Attachment Abolition Act, 1870): " Now, it may be that the term ' wages,' according to the etymological meaning of the word, may be correctly applied to any remuneration for services, but it seems to me that the popular signification must be looked to."

(ii) *Scientific and technical language.* The second rule is that if the statute is one passed with reference to a particular trade, business or transaction, words are used therein which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning which may differ from the ordinary or popular meaning. Lord Esher, M.R., in *R. v. Commissioners under Boiler Explosions Act*, 1882 (b), in considering the meaning of the term " boiler," said: " I apprehend that in this Act it was not meant to draw these scientific distinctions but to deal with the thing in which there is steam under pressure which is likely to explode." As Fry, J., said: " If it is a word which is of a technical or scientific character then it must be construed according to that which is its primary meaning, namely, its technical or scientific meaning" (c); and Farwell, L.J., said in *Mason v. Bolton's Library* (d): " It is a stringent rule of construction that in construing an Act of Parliament or a deed containing technical words, those words must be given their technical meaning." The learned Lord Justice was referring to the use of the expression " interpleader summons " in section 1 of the Bankruptcy Act, 1890.

And, as Kent observes (Commentaries, vol. i, p. 462), " if technical

(i) *H. E. Greene & Sons v. Minister of Health*, [1948] 1 K. B. 34.

(u) *Webb v. Knight* (1877), 2 Q. B. D. 530.

(v) *Garner v. Burr*, [1951] 1 K. B. 31, 33.

(x) *Powell v. Cleland* (1947), 63 T. L. R. 626.

(y) *Labour Relations Board of Saskatchewan v. John East Ironworks Ltd.*, [1949] L. J. R. 66, 71, 72 per Lord Simonds.

(z) *Macbeth v. Chislett*, [1910] A. C. 220, 223, Lord Loreburn, L.C.; 224, Lord Shaw: It had been contended that the meaning given to " seamen " in the repealed Merchant Shipping Act, 1854, was to be imported into the Employers and Workmen Act, 1875, and the Employers' Liability Act, 1880.

(a) (1882), 9 Q. B. D. 45, 46.

(b) [1891] 1 Q. B. 703, 716.

(c) *Holt & Co. v. Collyer* (1881), 16 Ch. D. 718, 720.

(d) [1913] 1 K. B. 83, 90.

words are used in a statute, they are to be taken in a technical sense (e), unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptance" (f). The term "technical" can only mean terms of the particular art or subject-matter to which they relate. In *Income Tax Commissioners v. Pemsel* (g), Lord Halsbury, in construing the word "charitable" in the Income Tax Act, 1842, demurred to the phrase "technical," and said: "The alternative, to my mind, may be more accurately stated as lying between the popular and ordinary interpretation of the word 'charitable' and the interpretation given by the Court of Chancery to the use of the word in the statute of 43 Eliz." c. 2 (The Poor Relief Act, 1601).

(iii) *Elliptical expressions.* Expressions are sometimes to be found in statutes which require to be somewhat expanded in order to arrive at what is really meant. Thus, in *Robertson v. Day* (h), it appeared that by the Lands Act Amendment Act (New South Wales), 1875, s. 31, power was given to a Crown lessee to apply to purchase lands comprised within his lease, "provided that no such application should be made for more than one square mile within each block of five miles square out of each lease." It was contended that this enactment gave a right to pre-emption of one square mile *only* if it formed part of a block which was a geometrical square containing an area of twenty-five square miles, and that there was no power to purchase a square mile if the block, although containing twenty-five square miles, was not a precise square. But the Judicial Committee held otherwise. "It is doing," said they, "no violence to language to read the words as if slightly elliptical, and as if they were 'within each block of an area of five miles square.'" This case may also be cited as an instance of the adoption of a popular meaning.

(iv) *Unreasonable or absurd constructions.* Another important rule as to the meaning which is to be put upon ordinary words or expressions when used in statutes is, as Keating, J., said in *Boon v. Howard* (i), "that if the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail." "That," said Bowen, L.J., in *Gard v. London Sewers Commissioners* (k), "is what Lord Coke calls the *argumentum ab inconvenienti*."

(e) See *per* Jessel, M.R., in *Laird v. Briggs* (1881), 19 Ch. D. 22, 34.

(f) See *Att.-Gen. v. Mitchell* (1881), 6 Q. B. D. 548, 555, where Lindley, J., said: "Sect. 2 of the Succession Duty Act (1853), is capable of two modes of construction. One is the popular construction . . . but that construction has never been applied to it. The other is not an equitable construction (as it has been called) but a conveyancer's construction." See *Lord Wolverton v. Att.-Gen.*, [1898] A. C. 535, 543, (meaning of "succession" in Succession Duty Act, 1853).

(g) [1891] A. C. 531, at p. 542.

(h) (1881), 5 App. Cas. 63, 69.

(i) (1874), L. R. 9 C. P. 277, 308. Cf. *Falmouth Boat Construction v. Howell*, [1950] 2 K. B. 16 *per* Singleton, L. J., at p. 30; *per* Denning, L. J., at p. 23.

(k) (1885), 28 Ch. D. 486, 511.

Thus, in *R. v. Skeen* (1), it appeared that it was enacted by 5 & 6 Vict. c. 39, s. 6, that "no agent shall be liable to be convicted by any evidence whatsoever in respect to any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed the same in any examination before a commissioner in bankruptcy." The prisoner, after he had been committed for trial, but before the indictment, had been examined before a commissioner in bankruptcy, and had then made a statement in every respect in accordance with the evidence upon which he was convicted. The question was raised as to whether the prisoner had made "a disclosure" within the meaning of the above section. The majority of the Court held he had not done so. "If," said they, "the language employed admit of two constructions, and according to one of them the enactment would be absurd and mischievous, and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the Legislature intended. . . . For can it be supposed that the Legislature intended wantonly to extend the indemnity to cases where there is no merit whatever in the accused, where he states only what he knows to be already notorious, and where neither civil nor criminal justice can be at all advanced by the alleged disclosure?" However, the Court also said: "Where by the use of clear and unequivocal language capable of only one construction anything is enacted by the Legislature, we must enforce it, though in our own opinion it is absurd or mischievous" (m).

Legal technology.

4. *Technical words to be avoided in Acts of Parliament.* In the opinion of Lord Thring (n), "technical phraseology should be avoided" in drafting Acts of Parliament (o); "the word," says he, "best adapted to express a thought in ordinary composition will generally be found to be the best that can be used in an Act of Parliament." In *Earl of Zetland v. Lord Advocate* (p), the question arose as to what was meant by the expression "devolution by law," as used in section 2 of the Succession Duty Act, 1853. "'Devolving an estate or devolution by law,'" said Lord Blackburn, "is not a technical set of words either in England or Scotland, it is used in this Act which is meant to apply equally to English and Irish estates and to Scotch estates; probably it was purposely chosen as being a phrase which the law had neither appropriated nor to which it had given any particular meaning, and we have to arrive at its meaning by taking the whole context and looking at the subject-matter, and thus seeing what the words do mean."

(1) (1859), 28 L. J. M. C. 91.

(m) Adopted by Farwell, L.J., in *Sadler v. Whiteman*, [1910] 1 K. B. 868, 892.

(n) Thring, p. 81.

(o) Also it would seem desirable to avoid "language neither wholly popular nor altogether technical, and which, therefore, is not to be interpreted readily either by a lawyer or a layman"; *R. v. Yates* (1882), 11 Q. B. D. 750, 752 Mathew, J.

(p) (1878), 3 App. Cas. 505, 522.

Use of words judicially interpreted. "There is a well-known principle of construction, that where the Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted" (q), unless a contrary intention appears. In *Barras v. Aberdeen Steam Trawling and Fishing Co.* (r), Lord Buckmaster, speaking with reference to the meaning of "wreck" said: "It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been ascribed to it". This opinion was discussed by the Court of Appeal recently in *Royal Crown Derby Porcelain Co. v. Russell* (s), where it was argued that certain words contained in s. 5 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and which were re-enacted in the amending Act of 1933, having been judicially construed by the Divisional Court in 1925, must bear that construction in the 1933 Act. The Court of Appeal decided that the construction placed upon the words by the Divisional Court was erroneous and Denning, L.J., said: "I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put upon it. The true view is that the Court will be slow to overrule a previous decision when it has been long acted on and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted a statute in the same terms, but if a decision is in fact shown to be erroneous, there is no rule of law which prevents it being overruled." (t).

The same rule applies to words with well-known legal meanings, even though they have not been the subject of judicial interpretation. In *R. v. Slator* (x), it was argued upon section 7 of the Corrupt Practices Prevention Act, 1863, that the term "indictment" there meant "criminal proceeding." The Court rejected the contention, Denman, J., saying: "It always requires the strong compulsion of other words in an Act to induce the Court to alter the well-known meaning of a legal term." And Bowen, J., added: "The whole of the argument fails if it is not shown that there is a popular use of the term 'indictment' as including 'information.' There is certainly no such

(q) *Jay v. Johnstone*, [1893]*1 Q. B. 25, 28. See *Greaves v. Tofield* (1880), 14 Ch. D. 563; *Lancashire & Yorkshire Ry. v. Bury Corp.* (1889), 14 App. Cas. 417.

(r) [1933] A. C. 402, 411. See also *Beaman v. A. R. T. S.*, [1949] 1 K. B. 550, 567, per Somervell, L.J.

(s) [1949] 2 K. B. 417, 429. The case overruled was *Braby (Frederick) & Co. v. Bedwell*, [1926] 1 K. B. 456, and *Braithwaite & Co. Ltd. v. Elliott*, [1947] K. B. 177, was approved.

(t) See also p. 161 *post*.

(x) (1881), 8 Q. B. D. 267, 272, 274.

popular use of the term among lawyers, and if there is among persons ignorant of the law, it is an incorrect use of the term."

In Acts relating to the whole of the United Kingdom legal terms are occasionally used in a sense belonging to the legal system of part only. Thus, in *Income Tax Commissioners v. Pemsel* (y), the words "charitable purposes" in the Income Tax Act, 1842, were construed in the sense given by the Court of Chancery to earlier English Acts, although the Act extended to Scotland (z).

Use of same words in different senses in same Act. "It is a sound rule of construction," said Cleasby, B., in *Courtauld v. Legh* (a), "to give the same meaning to the same words occurring in different parts of an Act of Parliament." The presumption that the same words are used in the same meaning is however very slight and it is proper, "if sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of an Act" (b). For instance, if, as Fry, L.J., said in *Re Moody and Yates' Contract* (c), "a word is used inaccurately in one section of a statute, it must not be assumed to have been used inaccurately when it occurs in another section of the same statute." And, in fact, a word may be used in two different senses in the same section of an Act. "It is obvious," said North, J., in *Re Smith, Green v. Smith* (d), "that the word 'property' is used in section 54 of the repealed Bankruptcy Act, 1869, in two totally different senses." The Court said, in *Doe d. Angell v. Angell* (e): "Considerable difficulty arises in the construction of the Real Property Limitation Act, 1833, by reason of the word 'rent' being used in two different senses throughout—viz., in the sense of a rent charged upon land, and of a rent reserved under a lease." Similarly, in *R. v. Allen* (f), the Court held, as to the word "marry" in section 57 of the Offences against the Person Act, 1861, which enacts that "whosoever, being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony," that "it is at once self-evident that the proposition that the same effect must be given to the term 'marry' in both parts of the sentence cannot possibly hold good."

This rule of construction is clearly recognised by Parliament, since it is now usual, in the interpretation clause of every Act, to insert the words, "unless a contrary intention appears," or "unless the context otherwise requires," or other similar words cutting down the general application of the definition.

(y) [1891] A. C. 532, 580.

(z) See also *Stephenson v. Higginson* (1852), 3 H. L. C. 638, 686, Lord Truro.

(a) (1869), L. R. 4 Ex. 126, 130. *Lewis v. Cattle*, [1938] 2 K. B. 454, 457. *R. v. Belfast JJ.*, [1947] N. I. 191.

(b) *Per* Turner, L.J., in *Re National Savings Bank* (1866), L. R. 1 Ch. App. 547, 550.

(c) (1885), 30 Ch. D. 344, 349.

(d) (1883), 24 Ch. D. 672, 678.

(e) (1846), 9 Q. B. 355.

(f) (1872), 1 C. C. R. 367, 374.

Subject and occasion of use of words may affect meaning. "Except in mathematics," said Grove, J., in *Wakefield L. B. v. Lee* (g), "it is difficult to frame exhaustive definitions of words"; consequently, as the Court said in *R. v. Hall* (h), "the meaning of ordinary words, when used in Acts of Parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained." Similarly, Brett, M.R., said in *The Dunelm* (i): "My view of an Act of Parliament which is made applicable to a large trade or business is that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing." For, as Lord Blackburn said in *Edinburgh Street Tramways Co. v. Torbain* (k): "Words used with reference to one set of circumstances may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances would or might have produced," and therefore it sometimes happens that, as Best, C.J., said in *Wynne v. Griffith* (l), "the same words receive a very different construction in different statutes" (m). In *R. v. Hall* (n). it was argued that the word "householder" as used in 26 Geo. 3, c. 38 (defining the qualification necessary for a commissioner of the Court of Requests at Bristol), meant nothing more than (as Johnson's Dictionary defined it) "a master of a family," and that it must therefore be taken as synonymous with "resident householder." On the other hand, it was said that the word must not receive so strict a construction, and that a man might be a householder without being resident. The Court decided in favour of the less restricted meaning of the word, on the ground that the object of the statute was to unite respectability of character and circumstances in the place wherein the office of commissioner was to be exercised, with a habit of access and resort to that place, and that this object was attained by excluding on the one hand mere lodgers, who had no permanent interest in the place, and on the other hand persons having neither residence in the place

(g) (1876), 1 Ex. D. 336, 343.

(h) (1822), 1 B. & C. 123, 136, Abbot, C.J.

(i) (1884), 9 P. D. 164, 171.

(k) (1877), 3 App. Cas. 58, 68.

(l) (1825), 3 Bing. 179, 196.

(m) Thus the word "apprentice" in 6 Geo. 4, c. 16, s. 49, was held in *Ex p. Prideaux* (1837), 3 Myl. & Cr. 332, not to include an attorney's articulated clerk; but in *St. Pancras v. Clapham* (1860), 2 E. & E. 742, the same word in 3 & 4 Will. & M. c. 11, s. 8, was held to include an attorney's articulated clerk. So "bicycle" has been held to be a carriage within the meaning of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), (*Taylor v. Goodwin* (1879), 4 Q. B. D. 228); of 7 Geo. 3, c. lxxiii (*Cannan v. Earl of Abingdon*, [1900] 2 Q. B. 66); and under section 12 of the Licensing Act, 1872 (*Corkery v. Carpenter*, [1951] 1 K. B. 102); but not to be a carriage within the meaning of 2 & 3 Will. 4, c. lv (*Williams v. Ellis* (1880), 5 Q. B. D. 175); nor of a local bridge Act (5 Geo. 4, c. cxiv) (*Simpson v. Teignmouth, etc., Bridge Co.*, [1903] 1 K. B. 405 (C. A.)).

(n) *Supra*.

nor such connection with it as might induce a habit of access and resort to it. A decision was arrived at on similar grounds in the case of *The Lion* (o), as to the meaning of the word "passenger." After citing the above-mentioned *dictum* of Abbott, C.J., in *R. v. Hall* the Judicial Committee held that deducing the meaning of the word from a consideration of "the subject or occasion on which it was used," the word "passenger" would not include the wife and father of the captain of the ship, who had both been invited by the captain to travel in the ship without the privity of the owners of the ship, and without paying any fare. Section 5 of the Matrimonial Causes Act, 1859, gives power to the Court to make orders as to the application of settled property "for the benefit of the children of the marriage or of their respective parents." In *Bird v. Bird* (p), it was held that the word "parents" meant the parents of children living at the date of suit, and not merely persons who had once been parents and whose children were dead, on the ground that "the governing object of the Legislature was to enable the Court to make a provision for the children of the marriage, and only as subsidiary to that object to make provision for the parents" (q).

Terms in statutes conferring the franchise. There is said to be a special rule with regard to the construction of words which confer the franchise, viz., that such words must be construed "in their largest ordinary sense." "That is the rule," said Willes, J., in *Piercy v. Maclean* (r), "which has been constantly (s) acted upon by this Court in construing the statutes which relate to the franchise." In that case, therefore, it was held that the word "counting-house", in the absence of anything in the subject-matter or in the context to restrain it to any particular sort of counting-house, included anything that is a counting-house in the largest ordinary sense.

Judicial interpretation of word in prior statute. It is a general rule of construction, which has already been noticed (t), that the use in a statute of a term which has received a judicial construction leads to the presumption that the term is used in that sense. Accordingly notwithstanding the fact that (as we have just seen) (u) the meaning of ordinary words will vary according to the subject or occasion on which they are used, if, as Lord Coleridge said in *Barlow v. Teal* (w), "Acts of Parliament use forms of words which have received judicial

(o) (1869), L. R. 2 P. C. 525.

(p) (1866), L. R. 1 P. & D. 231.

(q) This was the reason given by Montague Smith, J., in *Corrance v. Corrance* (1868), L. R. 1 P. & D. 495, 498, for following *Bird v. Bird*.

(r) (1870), L. R. 5 C. P. 252, 261.

(s) E.g., *Hughes v. Chatham Overseers* (1843), 5 M. & G. 54, 80, Tindal, C.J., said that: upon an Act of Parliament conferring the franchise the largest ordinary sense is that in which the words ought to be construed. This has not been applied so as to give the franchise to "persons" of the feminine gender. See p. 177 *post*.

(t) See pp. 158 *ante*.

(u) See p. 160 *ante*.

(w) (1884), 15 Q. B. D. 403, 405.

construction, in the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them" (x). The rule enunciated in Australia by Griffiths, C.J., in *D'Emden v. Pedder* (y), and adopted by the Privy Council in *Webb v. Outrim* (z), is similar. "No doubt it is a general rule of construction that when particular words in a statute have received judicial interpretation and the statute is subsequently repealed and re-enacted in identical terms, the words in the new enactment should be construed in the sense previously attributed to them by the judiciary. But I think that rule only applies to cases of *considered* decisions upon the meaning of particular words in a statute" (a).

This rule is especially applicable to terms used in consolidation Acts. In *Mitchell v. Simpson* (b), Lord Esher, in speaking of the Sheriffs Act, 1887, said: "The Act of 1887 is a consolidation Act, and the provision in question is in substantially the same terms as that of the Act of Geo. 2, and therefore, in order to determine the meaning of the provision, we must consider to what the Act of Geo. 2 was applicable." This is a strong instance, as the arrest on mesne process to which the Act of Geo. 2 solely applied, was almost wholly abolished by the Debtors Act, 1869.

"Charitable purposes." In *Commissioners of Income Tax v. Pemsel* (c), the House of Lords held that the expression "charitable purposes" in section 61 of the Income Tax Act, 1842, must be construed according to the legal and technical meaning given to those words by English law and was not restricted to the more popular sense of "relief from poverty." Lord Macnaghten said (d): "In construing Acts of Parliament it is a general rule not without authority in this House (*Stephenson v. Higginson* (e)), that words must be taken in their legal sense unless a contrary intention appears." And he went on to say that the fact that this expression had not a strict legal sense in Scotland, although the Act in question applied to Scotland, did not show a contrary intention.

"Damage." In *Rhodes v. Airedale Commissioners* (f), Lord Coleridge said, with regard to the word "damage," as follows: "The

(x) Cf. *Dixon v. Caledonian Ry.* (1880), 5 App. Cas. 820.

(y) (1904) 1 Austr. C. L. R. 91, 110.

(z) [1907] A. C. 81, 89. Cf. p. 130 *ante*.

(a) *Mackay v. Davies* (1904), 1 Australia C. L. R. 483, 491, Griffith, C.J.; *Bridge v. Bowen* (1916), 21 Australia C. L. R. 582, 601. In *Nicholls v. Cumming* (1877), 1 Canada 395, 420, Richards, C.J., said: "I think that the legislative approval of the interpretation of the sections of the statute of 16 Vict. c. 182, by the judgment of the Court of Queen's Bench referred to (*London Municipality v. G. W. Ry.* (1858), 16 Upp. Can. Q. B. 500), by substantially re-enacting these sections in the Ontario Act, binds us to give the same interpretation to those sections."

(b) (1890), 25 Q. B. D. 183, 188. Cf. *Smith v. Baker*, [1891] A. C. 325, 349, *per* Lord Watson.

(c) [1891] A. C. 531.

(d) *Ibid.*, p. 580.

(e) (1852), 3 H. L. C. 638, at p. 686.

(f) (1876), 1 C. P. D. 380, 390.

Legislature, in using the word 'damage,' used a word to which a legal meaning had already been affixed by judicial decisions; it must be taken to have used it in the sense ascertained by those decisions, *i.e.*, actionable damage."

"*Lands.*" So, in *Edinburgh Water Co. v. Hay* (g), where the question was, whether a certain water company were such occupiers of the land through which their pipes passed as to be liable to be rated under the Poor Law (Scotland) Act, 1845, the Lord Chancellor (Lord Cranworth), after pointing out that the same question had already been decided with regard to the liability of water companies in England under the Act of 43 Eliz. c. 2, said: "It is impossible to believe that the Legislature could intend that the word 'lands' should mean one thing in an Act with reference to Scotland and another thing in an Act with reference to England, more particularly as the object of the Scotch Act was to introduce into Scotland enactments very analogous to those already existing in England. The Legislature must be supposed to have had the result of the decisions as to the English statute present in its mind when it passed this Act relating to Scotland" (h).

"*Minerals.*" In *North British Ry. v. Budhill Coal and Sandstone Co.* (i), the question was whether sandstone was a mineral and Lord Loreburn, L.C., said: "In my opinion the decisions in 1818 (j) and 1841 (k) as to the meaning of minerals in private conveyances are of the greatest importance in interpreting this statute" (section 70 of the Railways Clauses Consolidation (Scotland) Act, 1845). "When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense. The Act merely says what shall be deemed to be reserved out of the conveyance. It is the same as though there were in the conveyance a written exception of the substances reserved. It would be very strange if a Court, having before it two conveyances with a reservation of minerals in both, was obliged to treat the reservation as meaning one thing in the first, and quite a different thing in the second, merely because the one was a conveyance by agreement and the other was compulsory under the Act. The Court has to determine what the words mean in the vernacular of the mining world, the commercial world and landowners, only at the time when the purchase was effected and whether the particular substance was regarded as a mineral."

Legislature assumed to be aware of its own distinctions. Again, if we find that in previous legislation two different words have been designedly used to express two distinct things, we may assume that in subsequent statutes the Legislature has not lost sight of the distinction

(g) (1854), 1 Macq. H. L. (Sc.) 682, 687.

(h) Cf. *Davies v. Kennedy* (1869), 1r. Rep. 3 Eq. 691.

(i) [1901] A. C. 116, 127; Cf. *Lord Provost of Glasgow v. Farie* (1888), 13 App. Cas. 657, 669.

(j) *Menzies v. Earl of Breadalbane* (1818), 1 Shaw App. Sc. 225.

(k) *Duke of Hamilton v. Bentley* (1841), 3 Dunlop (Sc.) 1121.

uniformly observed in the preceding statutes. Thus, in *Smith v. Brown* (l), the question was whether the Legislature in enacting in section 7 of the Admiralty Court Act, 1861, "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," intended to give the Court jurisdiction in cases where personal injuries and death were caused by collisions at sea. It was pointed out that "damage" is not interchangeable with "injury," and the distinction is not merely verbal but substantial, and is observed in the Merchant Shipping Act, of 1854 and the Merchant Shipping Amendment Act of 1862. The Court held that the Court of Admiralty had no such jurisdiction (m).

Public policy as affecting construction.

5. If there is a general tendency of decisions, whether at common law or under statute, towards a particular legal result, it may fairly be assumed to be the policy of the law to effect that result (n). In construing statutes, however, the policy of the law can only be taken into account when the statute under consideration is not explicit. To adopt any other method of construction would be to impose upon the subject the political, moral, social, or religious views of the Judges, instead of construing and ascertaining the definite intention of the Legislature.

In *R. v. Hipswell* (o), Bayley, J., held that the word "void," as used in 28 Geo. 3, c. 48, s. 4, "should receive its full force and effect," because it had been introduced into the statute "for public purposes." If this term merely indicates the policy of the Legislature as indicated in the statute or group of statutes under consideration, it is merely an alternative expression to "the intention," "the evil" or "the mischief" (p), of the statute (q), and is illustrated by such cases as *Duncan v. Aberdeen County Council* (r), where section 11 of the Poor Law (Scotland) Act, 1934 was held by Lords Atkin and Blanesburgh to be "a remedial section intended specially to benefit a class of persons entitled in the view of the Legislature to exceptional consideration." Lord Thankerton thought the section "alters not only the standard of adequacy of outdoor relief but also the standard of poverty which

(l) (1871), L. R. 6 Q. B. 729, 732, Cockburn, C.J.

(m) The dicta of Baggallay, L.J., in *The Franconia* (1877), 2 P. D. 163, 173, as to *Smith v. Brown* seem to have been disapproved in *Seward v. Vera Cruz* (1884), 10 App. Cas. 59, 72.

(n) As to the law on public policy see the speeches of Lord Atkin and Lord Wright in *Fender v. Mildmay*, [1938] A. C. 1 at pp. 10-14 and 38-42 respectively.

(o) (1828), 8 B. & C. 466, 471.

(p) "It is a settled principle that the Court should so construe an Act of Parliament as to apply the statutory remedy to the evil or mischief which it is the intention of the statute to meet": *Provost, etc. of Glasgow v. Hillhead* (1885), 12 Rettie (Sc.) 864, 872, Lord Shand. *R. B. Policies at Lloyds v. Butler*, [1949] 2 A. E. R. 226, 227.

(q) For discussion of the policy of a colonial Act, see *Alison v. Burns* (1889), 15 App. Cas. 44.

(r) (1936), 106 L. J. P. C. 1, 3, 4, 6.

is to give the legal right to that relief." So in *Powell Lane Manufacturing Co. v. Putnam* (s), it was held that the object of section 11 (1) of the Finance Act, 1926 was to tax packing or wrapping paper which, when imported, would be in competition with the English products. Likewise the object of section 9 (1) of the Finance Act, 1928 was held to be the protection of the English button trade (t). More recently it was held that caves for storing cinematograph films were "premises" within sec. 1 of the Celluloid and Cinematograph Film Act, 1922 as this was a safety Act and it was the intention of Parliament to use the widest possible word (u). In *Caledonian Ry. v. North British Ry.* (x), Lord Selborne thought that a literal construction of a statute ought not to prevail if the words are sufficiently flexible to admit of another construction which will carry out the intention.

Objections to construction in accordance with public policy. On several occasions this principle of construction has been called in question. In *R. v. St. Gregory* (y), Taunton, J., said, with regard to the dictum of Bayley, J., in *R. v. Hipswell* (supra): "In that case the judgment was rested partly on the consideration of public policy, a very questionable and unsatisfactory ground, because men's minds differ much on the nature and extent of public policy."

If public policy is taken as meaning general considerations of State or of opinion apart from the statute under discussion, the existence of the rule is open to serious question. "Public policy is always an unsafe and treacherous ground for judicial decision" (z); and its application is difficult, if not mischievous (a). "Public policy," said Burroughs, J., in *Fauntleroy's Case* (b), "is a restive horse, and when you get astride of it, there is no knowing where it will carry you."

Many Judges have pointed out the dangers of resorting to considerations of public policy in this sense, as an aid to the construction of contracts, in terms which are equally applicable to statutes. In *Hardy v. Fothergill* (bb), Lord Selborne thus stated the proper course to be adopted: "It is not, I conceive, for your lordships or for any other Court to decide such questions as this under the influence of considerations of policy, except so far as that policy may be apparent from, or at least consistent with, the language of the

(s) [1931] 2 K. B. 305.

(t) *Newman Manufacturing Co. v. Marrables*, [1931] 2 K. B. 297.

(u) *Gardiner v. Sevenoaks, R. D. C.*, [1950] 66 T. L. R. (Pt. 1) 1091.

(x) (1881) 6 App. Cas. 114, 121, 122. Cf. *Att.-Gen. v. Beauchamp*, [1920] 1 K. B. 650.

(y) (1834), 2 A. & E. 99, 107.

(z) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, 500, Lord Davey; 507, Lord Lindley; and see *Egerton v. Brownlow* (1853), 4 H. L. C. 1, 106, 123, Alderson and Parke, B.B.

(a) But see the dicta of Lord Shaw in *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, 108; and of Fletcher Moulton and Farwell L.JJ., in the same case, [1909] 1 Ch. 163, 186, 193. The case turned on the legality of levies on members of trade unions to pay for members of Parliament pledged to support a particular programme.

(b) *Amicable Society v. Bolland* (1830), 4 Bligh. (N.S.) 194; 2 Dow. & Cl. 1.

(bb) (1888), 13 App. Cas. 351, 358.

Legislature in the statute or statutes upon which the question depends " (c).

Limitation of meaning by construction.

6. *Words of limitation not as a rule to be read into statute.* Words of limitation are not to be read into a statute if it can be avoided. This cardinal point is thus stated by Bowen, L.J., in *R. v. Liverpool Justices (d)*: "One objection which, to my mind, is almost conclusive evidence against it [the decision in *Ex p. Todd*] (e) is this, that so to construe the section (f) is reading into it words which limit its *prima facie* operation, and make it something different from, and smaller than, what its terms express. Now, certainly we should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure." And Lord Hanworth more recently said: "It is a fundamental principle in construing an Act of Parliament to give to it its ordinary and grammatical meaning if this produces no repugnancy or inconsistency" (g).

When limitation necessary. But in some cases a limitation may be put on the construction of the wide terms of a statute. Lord Herschell said, in *Cox v. Hakes (h)*: "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation" (i). General words therefore "must be understood as used with reference to the subject-matter in the mind of the Legislature and limited to it" (i).

Lord Haldane said in *Watney, Combe, Reid & Co. Ltd. v. Berners (k)*: "The intention must be found in the language finally adopted in the statutes under consideration and in that language alone. No doubt general words may in certain cases properly be interpreted as having a meaning or scope other than the literal or usual meaning. They may be so interpreted where the scheme appearing from the language of

(c) This proposition has been accepted in Australia: *Tasmania v. Commonwealth* (1904), 1 Australia C. L. R. 329, 349, Barton, J. The learned Judge proceeded to interpret the policy of the Commonwealth Constitution Act, 1900 (63 & 64 Vict. c. 12) by reference to its history, saying: "The intention of an instrument is to be gathered from the obvious facts of its history—if we at all go outside the four corners of the instrument itself and the policy logically to be deduced from its express words."

(d) (1883), 11 Q. B. D. 638, 649.

(e) (1878), 3 Q. B. D. 407.

(f) 9 Geo. 4, c. 61, s. 14; now incorporated in 10 Edw. 7 & 1 Geo. 5, c. 24, s. 23 (Licensing Acts).

(g) *Re Jenkins*, [1931] Ch. 218, 231.

(h) (1890), 15 App. Cas. 506, 529, and Lord Bramwell 522.

(i) Maxwell, 9th ed. pp. 55 ff. cited in *Cox v. Hakes supra*.

(k) [1915] A. C. 885, 891.

the Legislature, read in its entirety, points to consistency as requiring the modification of what would be the meaning apart from any context, or apart from the purpose of the Legislature as appearing from the words which the Legislature has used, or apart from the general law."

And a similar canon has been laid down in the Privy Council in *Blackwood v. R. (l)*: "One of the safest guides to the construction of sweeping general words which it is difficult to apply in their full literal sense is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification."

The point decided in the case was that in a Victorian Act the words "personal estate" subject to duty under the Act did not include personalty situate outside the limits of the colony and beyond its jurisdiction.

This question might have been solved by reference to the constitutional rule that a colony cannot legislate in respect of anything outside its local limits, but it is the settled policy of the Privy Council not to decide that colonial Acts are *ultra vires* if it can avoid that conclusion, but rather to read wide general words as subject to some limitation. In the same way terms in English Acts are sometimes limited to avoid what is assumed to have been an undesigned conflict with international law. "Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established principles of international law" (m).

In *Burge v. Ashley & Smith, Ltd. (n)*, the words "money paid" in the Gaming Act, 1892, were held not to include money deposited by way of stakes on a wager. Collins, L.J., said: "I agree that the words looked at by themselves might cover the case. But I think we have to consider something more than the mere words. The Act was passed, after a long chain of authorities, establishing that a sum deposited, as in the present case, might be recovered. If it had been intended to alter the law as established by these decisions, I should have expected to find a clear expression of that intention, which I do not find in this Act."

"As a matter of ordinary construction," said Lord Bramwell in *Great Western Ry. v. Swindon, etc., Ry. (o)*, "where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited

(l) (1882), 8 App. Cas. 82, 94.

(m) *Bloxam v. Favre* (1883), 8 P. D. 101, 104; (1884), 9 P. D. 130. Cf. *Macleod v. Att.-Gen. for New South Wales*, [1891] A. C. 455, 458.

(n) [1900] 1 Q. B. 744, 750.

(o) (1884), 9 App. Cas. 787 at p. 808.

to the last, but applies to all. For instance, 'horses, oxen, pigs, and sheep, from whatever country they may come'—the latter words would apply to horses as much as to sheep" (p). But there is also a limiting rule of construction applicable where there is a particular description of objects, sufficient to identify what was intended, followed by some general or "omnibus" description. This latter description will be confined to objects of the same class or kind as the former (q).

General words limited by the ejusdem generis rule. This rule of law, generally known as the *ejusdem generis* rule, or the rule *noscitur a sociis*, was thus enunciated by Lord Campbell in *R. v. Edmundson* (r): "I accede," said he, "to the principle laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." It is really a question of the assumed intention of the statute. Thus, in *Scales v. Pickering* (s) the question was what was the meaning of the word "footway" when used in a private Act which empowered a water company to "break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages, and public places," provided they did not enter upon any private lands without the consent of the owner. It was contended that this authorised the company to break up the soil of a private field in which there was a public footway, but it was held otherwise. "Construing the word 'footway,'" said Best, C.J., "from the company in which it is found . . . the Legislature appears to have meant those paved footways in large towns which are too narrow to admit of horses and carriages." And Park, J., added: "The word 'footway' here *noscitur a sociis*." And in *Podar Trading Co. Ltd., Bombay v. Francois Tagher, Barcelona* (t), it was held that in a contract governed by the Rules of the Liverpool Cotton Association,

(p) In *Fletcher v. Lord Sondes* (1826), 3 Bing. (H. L.) 501 at p. 580, Best, C.J., said: "By 14 Geo. 2, c. 6, persons who should steal sheep or *any other cattle* were deprived of the benefit of clergy, but until the Legislature distinctly specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep." In *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143, the majority of the law lords held that the *ejusdem generis* rule applied to the words "or other place" which follow the words "house, office, room" in s. 1 of the Betting Act, 1853, and so applied it as to exclude Tattersall's Ring on a racecourse from the operation of the Act.

(q) The rule is well stated in a New Zealand case, *Cooney v. Covell* (1901), 21 N. Z. L. R. 106, 108, by Williams, J., in the following terms: "There is a very well known rule of construction that if a general word follows a particular and specific word of the same nature as itself, it takes its meaning from that word, and is presumed to be restricted to the same genus as that word. No doubt that rule is one which has to be followed with care; but if not to follow it leads to absurd results, then I am of opinion that it ought to be followed." The question in the case was whether the words "advertisements or other publications" in 56 Vict. No. 42 (for suppressing offensive publications) applied to a pamphlet sold as an appendix to a *bona fide* medical work.

(r) (1859), 28 L. J. M. C. 213, 215.

(s) (1828), 4 Bing. 448, 452, 453.

(t) [1949] 2 K. B. 277

rule 52, where a contract may be rendered impossible of performance owing to "unforeseen obstruction to traffic, strike, lock-out, riot, war, quarantine or *force majeure*," these last words must be construed with regard to the words which precede or succeed them. They must therefore be limited to something preventing *in time* the fulfilment of the contract as that rule refers to "the timely fulfilment of any contract." Failure of the Indian cotton crop was therefore no excuse. In *Shaw v. Ruddin* (u), the question was whether section 25 of the Dublin Carriages Act, 1853, which enacts that "it shall not be lawful for any person to use or let to hire any hackney carriage, job carriage, stage carriage, cart, or job horse, at any place within the limits of this Act," without having a licence for the same, applied to carts used for private purposes only. It was held that it did not. "In the interpretation of this Act," said Lefroy, C.J., "we have to aid us the long-established rule of construction—namely, that we must look to the associate terms in connection with which we find the word 'carts.' We find, then, that in the several sections in which that word occurs, it is associated with carriages and vehicles none other than those let or used for hire." In accordance with this rule, it was held that the Road Traffic Act of 1930, s. 48 (1) which defines a "traffic sign" to include "all signals, warning sign-posts, direction posts, signs or devices," must be construed as to "devices" as things *ejusdem generis* with the proceeding words and therefore, that a painted white line on a road was not a traffic sign within the section (x). So the words in section 10 (1) of the Land Charges Act, 1925 "right . . . over or affecting land" following the word "easement" were held to have a restricted meaning *ejusdem generis* with "easement" (y). In *Re Stockport, etc., Schools* (z), the Court of Appeal read the words "or other schools" in section 62 of the Charitable Trusts Act, 1853, as applying not to all schools of whatever description, but only to schools similar in character to the "cathedral, collegiate (or) chapter schools" mentioned in the section. Lindley, M.R., said: "I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate and chapter, except to show the type of school which they were referring to, and in my opinion other schools must be taken to mean other schools of that type."

In *Att.-Gen. v. Brown* (a) the rule was applied to the construction of section 43 of the Customs Consolidation Act, 1876, which provides that "The importation of arms, ammunition, gunpowder or any other

(u) (1858), 9 Ir. C. L. R. 214, 220.

(x) *Evans v. Cross*, [1938] 1 K. B. 694.

(y) *Lewisham Borough Council v. Maloney*, [1948] 1 K. B. 51.

(z) [1898] 2 Ch. 687, 696.

(a) [1920] 1 K. B. 773. In *Owners of S.S. Magnild v. Macintyre*, [1920] 3 K. B. 321, McCardie, J., points out that in considering whether a particular unspecified thing is *ejusdem generis* with specified things, the questions to be asked are, first, what common quality the specified things possess which constitute them a genus; then, does the particular unspecified thing possess that quality so that it may be regarded as of the same genus? It is not enough to consider merely whether the particular

goods may be prohibited by Proclamation." The question was whether a proclamation prohibiting the importation of pyrogallic acid was valid, and Sankey, J., after an elaborate review of the authorities, held that the proclamation was invalid, as pyrogallic acid was not in the same class as the particular articles set out in the section.

There must be a category. The *ejusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the Legislature (b). The modern tendency of the law, it was said (c), is "to attenuate the application of the rule of *ejusdem generis*." To invoke the application of the *ejusdem generis* rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply (d). "Unless you can find a category," said Farwell, L.J. (e), "there is no room for the application of the *ejusdem generis* doctrine," (f) and where the words are clearly wide in their meaning they ought not to be qualified on the ground of their association with other words (ff). For instance, where a local Act required that "theatres and other places of public entertainment" should be licensed, the question arose whether a "fun-fair" for which no fee was charged for admission was within the Act. It was held to be so, and that the *ejusdem generis* rule did not apply to confine the words "other places" to places of the same kind as theatres (g). So the insertion of such words as "or things of whatever description" would exclude the rule (h).

General words following particular words. In accordance with this principle of construction, it has always been held that general words following particular words will not include anything of a class superior

unspecified thing is like one or more of the specified things. The rule has frequently been applied in the construction of shipping documents and other contracts. See Scrutton on Charterparties, 15th ed., pp. 126, 238—240. And as to its application to the construction of a memorandum of association, see *Ashbury Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653.

(b) *Anderson v. Anderson*, [1895] 1 Q. B. 749; 753, Lord Esher, M.R., 755, Rigby, L.J. Cf: *Re Haynes, Knapp v. Haynes*, (1950) 2 A. E. R. 879, 880 Evershed M.R.

(c) Asquith, J., in *Allen v. Emmerson*, *infra*.

(d) *Hood-Barrs v. I. R. C.*, [1946] 2 A. E. R. 768.

(e) *Tillmans & Co. v. S.S. Knutsford*, [1908] 2 K. B. 385, 403, [1908] A. C. 207.

(f) See also *Russell v. Scott*, [1948] A. C. 422.

(ff) *Provost, etc., of Glasgow v. Glasgow Tramway Co.*, [1898] A. C. 631, 634, Halsbury, L.C.

(g) *Allen v. Emmerson*, [1944] K. B. 362.

(h) *Att.-Gen. v. Leicester Corporation*, [1910] 2 Ch. 359, 369. *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413 ("or otherwise"). There cannot be an inverse application of the rule—"I have never heard before of an inverse application of the *ejusdem generis* rule and I think it would be very dangerous here to attempt to cut down by the application of any such principle the wide words which precede," Cohen, L.J., in *Re Wellsted's Will Trusts*, [1949] Ch. 296, 318, C. A., disapproving Vaisey, J., the Court below, [1948] Ch. 610.

to that to which the particular words belong. This was pointed out by Coke in *Archbishop of Canterbury's Case* (i), where he says, as to 31 Hen. 8, c. 13, which discharged from payment of tithes all lands which came to the Crown by dissolution, renouncing, relinquishing, forfeiture, giving up, or by any other means, that this statute only discharged from tithes lands which came to the Crown by these or by any other inferior means, but did not discharge from tithe land which came to the Crown by virtue of an Act of Parliament, "which is the highest manner of conveyance that can be." And in commenting upon the Stat. West. 2 (13 Edw. 1, c. 41), Coke says (k): "Seeing this Act beginneth with abbots and concludeth with other religious houses, bishops are not comprehended within this Act, for they are superior to abbots, and these words [other religious houses] shall extend to houses inferior to them that were mentioned before." Thus, in *Casher v. Holmes* (l), it was held that the general words "all other metals" following the particular words "copper, brass, pewter, and tin" in the local Act of 6 Geo. 4, c. clxx, did not include silver or gold, those latter metals being of a superior kind to the particular metals mentioned in the Act.

General words not following particular words. The question whether, when the Legislature has used general words in a statute, not following particular or specific words, those words are to receive any (and, if so, what) limitation, is one which may sometimes be answered by considering whether the intention of the Legislature on this point can be gathered from other parts of the statute.

"It is a sound maxim of law," said the Judicial Committee in *Att.-Gen. for Ontario v. Mercer* (m), "that every word (in a statute) ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context." This doctrine is clear from a long list of authorities which appear all to be founded on the case of *Stradling v. Morgan* (n), where it is said as follows: "The Judges of the law, in all times past, have so far pursued the intent of the makers of statutes, that they have expounded Acts which are general in words to be but particular where the intent was particular. . . . The sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which

(i) (1596), 2 Co. Rep. 46 a.

(k) 2 Inst. 457.

(l) (1831), 2 B. & Ad. 592.

(m) (1883), 8 App. Cas. 767, 778.

(n) (1560), Plowd. 204. Cited and approved in *Cox v. Hakes* (1890), 15 App. Cas. 506, 516, and *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, 646, Bowen, L.J.; and the *Claim of Viscountess Rhondda*, [1922] A. C. 339.

expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." This rule is well illustrated by the decision arrived at in *The Dowse* (o), with regard to section 3 of the County Courts Admiralty Jurisdiction Act, 1868, which gives certain county courts jurisdiction as to "any claim for . . . necessities. . . ." It was argued that the words "any claim" ought not in any way to be limited, and that although the High Court of Admiralty would have no jurisdiction in the particular claim for necessities in question, still, that it was intended by this Act to give county courts jurisdiction as to all claims for necessities, whether the High Court of Admiralty had jurisdiction over such claims or not. But the Court held that the words used in the Act would be satisfied if the county court jurisdiction was confined to cases where the High Court of Admiralty would have jurisdiction. So in *Phillips v. Poland* (p), the meaning of "creditor" in the Bankruptcy Act, 1849 was restricted to creditors at the date of the bankruptcy and who have a right to come in and prove their debts. So the words "or otherwise" have recently been held to apply *ejusdem generis* with foregoing words (q).

Difficulty of laying down a general rule. Although it often happens that the words used in a statute are, as Coleridge, J., observed in *Clayton v. Fenwick* (r), "so general that they must receive *some* limitation," it is difficult, as the following cases will show, to lay down any general rule for arriving at the intention of the Legislature as to the precise limitation which must be put upon the meaning of general words used in a statute. In cases where some limitation is called for the Court may be influenced by the history, the mischief or the intention of the statute (s). In *Cargo ex Argos* (t), a similar question arose to that decided in *The Dowse* (u), namely, what, if any, limitation was to be put upon the meaning of the words "any claim," as used in section 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and although in *The Dowse* those words, as used in a statute *in pari materia* with this Act, were held to be used in a limited sense, the Court declined in this case to limit the words of the Act of 1869 to "so much of the partial and limited jurisdiction of the Admiralty

(o) (1870), L. R. 3 Ad. & Eccl. 135, *Everard v. Kendall* (1870), L. R. 5 C. P. 428.

(p) (1866) L. R. 1 C. P. 204, 207, Willes, J.

(q) *Eton R. D. C. v. Thames Conservators*, [1950] Ch. 540, 544.

(r) (1856), 6 E. & B. 114.

(s) *Nutton v. Wilson* (1889), 2 Q. B. D. 744, 748, Lindley, M.R., "We must look at the object to be attained"; *Cox v. Hakes* (1870), 15 App. Cas. 506, 517, Lord Halsbury.

(t) (1872) L. R. 5 P. C. 134, 150.

(u) *Supra*.

Court Act, 1861 as had not been included in the Act of 1868 and no more," commenting on the fact of the wide language employed in the Act which described accurately new heads of claim. So also in *Dapueto v. Wyllie* (x), the same Court declined to limit the meaning of the words "carried into," and, following the decision of Dr. Lushington in *The Bahia* (y), they held that the words were advisedly used instead of "imported," in order to give to the Court the utmost jurisdiction. So in *Duke of Newcastle v. Morris* (z), it was held that the words "all debtors" as used in the Bankruptcy Act, 1861, s. 69, included persons of every description, and that peers could not claim exemption from the operation of the Act on the ground that they had the privilege of Parliament. But, on the other hand, it was held in *Lord Colchester v. Kewney* (a), that section 25 of the Land Tax Act, 1798, which exempted "any hospital" from land tax, only applied to hospitals existing at the time the Act was passed. So the Vexatious Actions Act, 1896 which allows the Court to order a litigant, who indulges in persistent and vexatious legal proceedings, to obtain leave to proceed with his litigation, was held not to apply to criminal proceedings (b). So also in *Beckford v. Wade* (c), Sir W. Grant, M.R., pointed out that the Legislature evidently considered that the general words of 32 Hen. 8, c. 1, which declared that "all and every person or persons" may devise their lands by will, would enable infants or insane persons to devise by will, because they subsequently passed 34 Hen. 8, c. 5, expressly to prohibit this. So in *O'Shanassy v. Joachim* (d), it was held that the word "person" in a colonial Act was not necessarily restricted to persons above twenty-one, but might include infants, especially as the Act enlarged the power which infants previously had before the passing of the Act. In *R. v. White* (e), it was held that the words "or otherwise incapable of acting," following the words "dead or absent," were not to be confined merely to physical incapacity analogous to death or absence, but applied to any kind of incapacity, whatever might be the cause. In a modern case the question was whether under the Dentists Act, 1921, the General Medical Council could delegate its disciplinary powers to an executive council. Luxmoore, J., held that the enabling sub-section of the Act applied only to matters in which the General Medical Council was not required to act itself and said: "Having regard to the object with which the Act of 1921 was passed and to the position before its passing, I think sub-section 4 of section 16 ought not to be construed in the widest sense of the words used in it, but as conferring power on the General

(x) (1874), L. R. 5 P. C. 482.

(y) (1863), Br. & Lush. 61.

(z) (1870), L. R. 4 H. L. 661.

(a) (1866), L. R. 1 Ex. 368, 380.

(b) *Re Boaler*, [1915] 1 K.B. 21.

(c) (1805), 17 Ves. 87.

(d) (1875), 1 App. Cas. 82, 90.

(e) (1867), L. R. 2 Q. B. 563.

Council to act by an executive committee only in respect of those matters in which the General Council is not required to act itself" (f).

General words apply only to English and not to foreign persons or things. "Prima facie," said Lord Cranworth in *Jefferys v. Boosey* (g), "the Legislature of this country must be taken to make laws for its own subjects exclusively" (h). Another way of stating this principle is that all jurisdiction is properly territorial, and that the Courts will as a general rule presume that Parliament did not intend to interfere with international usage on this subject (i), or to legislate for foreigners not within British territory. In *Re A. B. & Co.* (k), Lindley, M.R., in dealing with the question whether a foreigner resident abroad could be made bankrupt in England, said: "What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then of course the Court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that unless Parliament has conferred on the Court that power in language which is unmistakable, the Court is not to assume that Parliament intended to do that which might seriously affect foreigners who are not resident here, and might give offence to foreign Governments (l). Unless Parliament has used such plain terms as to show that they really intended us to do that, we ought not to do it. That is the principle which underlies the decisions in *Ex p. Blain* (m) and *Ex p. Pearson* (n). Nothing can be plainer than the language of James, L.J., in *Ex p. Blain*, and the language of Cotton, L.J., is to the same effect" (o).

In *Thomson v. Adv.-Gen.* (p) the question arose whether, under Part 3 of the Schedule to the Legacy Duty Act, 1805, which enacted

(f) *General Medical Council v. United Kingdom Dental Board*, [1936] Ch. 41, 48.

(g) (1854), 4 H. L. C. 815, 955.

(h) Cf. *Cope v. Doherty* (1858), 27 L. J. Ch. 600, 609, Turner, L.J.

(i) *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670, 683, Earl of Selborne.

(k) [1900] 1 Q. B. 541, 544.

(l) This decision was affirmed, *sub nom. Cooke v. Charles A. Vogeler Co.*, [1901] A. C. 102, and distinguished in *Theophile v. Solicitor-General*, [1950] A. C. 186. Cf. *R. v. Keyn* (1876), L.R. 2 Ex. 63, 210, Cockburn, C.J., and p. 57 ante.

(m) (1879), 12 Ch. D. 522.

(n) [1892] 2 Q. B. 263. See also *Colquhoun v. Heddon* (1890), 25 Q. B. 129, 135, Esher, M.R.

(o) (1879), 12 Ch. D. 522, 533, where Cotton, L.J., said that "we must not give to general words an interpretation which would violate the principles of law admitted and recognised in all countries." This is in accordance with what was said by Sir W. Scott, in *The Le Louis* (1826), 2 Dods. 210, 239: "No British Act of Parliament can affect any right or interest of foreigners unless they are founded upon principles and impose regulations consistent with the law of nations . . . and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto." But this doctrine is too widely stated, in so far as it attempts to put any fetter on the supreme power of the Legislature. See, Part II, chap. viii, "Territorial Effect of Statutes".

(p) (1845), 12 Cl. & F. 1, 17, pp. 423 *et seq. post.*

that duty should be payable upon "every legacy given by any will or testamentary instrument of any person," legacy duty was payable upon legacies bequeathed by a testator who died domiciled abroad, and it was decided that the word "person" did not apply to such a case. "The very general words of the statutes," said Tindal, C.J., in delivering the opinion of the Judges, "... must of necessity receive some limitation in their application, for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, and whether, at the time of their death, domiciled within the realm or abroad. . . . We think such necessary limitation is that the statute does not extend to the will of any person who at his death was domiciled out of Great Britain" (q). So in *Jefferys v. Boosey* (r), it was held that the word "author" as used in the Copyright Act, 1710, which enacted that "the author of any book shall have the sole liberty of printing such for fourteen years," referred to British authors only, and not to authors of other nationalities (s); and in *R. v. Blane* (t) it was held that the word "bastard" in the Poor Law Amendment Act, 1844, meant a bastard born in this country (u).

General words limited so as not to alter the common law. Again, it is a rule as to the limitation of the meaning of general words used in a statute, that they are to be, if possible, construed so as not to alter the common law. "It must be remembered that it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or in so far as the statute is plainly intended to alter the course of the common law" (x). "The general rule in exposition," said the Court of Common Pleas in *Arthur v. Bokenham* (y), "is this, that in all doubtful matters, and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare." Again, in *Minet v. Leman* (z), Romilly, M.R., said: "The general words of an Act are not to be so construed as to alter the previous policy of the

(q) See *Wallace v. Att.-Gen.* (1865), L. R. 1 Ch. App. 1, where it was decided on similar grounds that succession duty is not payable upon personality in England devised by a person domiciled in a foreign country: *Att.-Gen. v. Campbell* (1872) L. R. 5 H. L. 521; *Simms v. Registrar of Probates*, [1900] A. C. 323; *Winans v. Att.-Gen.*, [1910] A. C. 27. (Foreign bearer bonds in this country belonging to a foreigner liable to estate duty).

(r) (1854), 4 H. L. C. 815.

(s) The decision of the House of Lords in *Routledge v. Low* (1868), L. R. 3 H. L. 100, as to the meaning of the word "author" as used in the Copyright Act, 1842 (5 & 6 Vict. c. 45), was that the word used in that Act was without limitation or restriction. See this question further discussed under "Territorial Effect of Statutes," Part II, chap. viii.

(t) (1849), 13 Q. B. 769.

(u) See Dicey; Conflict of Laws, 5th ed. p. 288.

(x) *R. v. Morris* (1867), L. R. 1 C. C. R. 90, 95, Byles, J., cited with approval by Slesser, L.J., in *Lord Eldon v. Hedley Bros.*, [1935] 2 K. B. 1, 24.

(y) (1708), 11 Mod. 148, 150.

(z) (1855), 20 Beav. 269, 278.

law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. . . . This principle of construction as a general proposition cannot be disputed" (a). A right to demand a poll is a common law incident of all popular elections (b), and, as such, "cannot be taken away by mere implication which is not necessary for the reasonable construction of a statute," said Brett, L.J., in *R. v. Wimbledon L. B.* (c), where it was contended that the Public Libraries Acts, 1855, 1866, and 1877 (all since repealed), had abolished the common law rule. In *Hawkins v. Gathercole* (d), the question was what meaning was to be attached to the words "rectories and tithes" in section 13 of the Judgments Act, 1838, which enacted that "a judgment already entered up shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes. . . ." On the part of the plaintiff it was contended that the words extended to all rectories and tithes, both lay and ecclesiastical, and that consequently a charge which he had upon the tithes receivable by the defendant as rector of a parish was a valid one. For the defendant it was contended that 13 Eliz. c. 20, s. 1, which was merely declaratory of the common law on the subject, and enacted that "all chargings of benefices with cure . . . shall be utterly void," rendered the plaintiff's charge invalid, and that the words "rectories and tithes" only applied to lay rectories and tithes. Turner, L.J., in giving judgment for the defendant, said: "It is one of the privileges of the clergy, secured to them by Magna Charta, that distresses shall not be taken by sheriffs in the inheritance of the Church wherewith it was anciently endowed. . . . These privileges remained intact down to the time of the passing of this Act, and looking to the cases referred to, I am very much disposed to think that the general words used in this section ought not in any event to be held to have abrogated these privileges, there being ample room for them to operate otherwise." Upon the same principle it was held in *Macleod v. Att.-Gen. for New South Wales* (e) that in an enactment which provided that "whosoever being married marries another person during the life of the former husband or wife wheresoever such second marriage takes place" should be liable to penal servitude, the word "wheresoever," must be limited to mean "wheresoever in this colony," as, if it were not so,

(a) In *Nolan v. Clifford* (1904), 1 Australia C. L. R. 429, 444, Griffith, C.J., said: "It is always necessary, in dealing with any law that alters the common law, and especially where the common law rights of the liberty of the subject or relating to property are concerned, to consider what was the previous law and what were the apparent reasons for the alterations made, and then to see what reasons there were for altering the law, and what the Legislature has done to remedy what it conceived to be defects in the law."

(b) *Anthony v. Seger* (1789), 1 Hagg. Consistory Rep. 9, 13 (Lord Stowell); *Campbell v. Maund* (1836), 5 A. & E. 865; *R. v. Bishop of Salisbury*, [1901] 1 K. B. 573, 579; 2 K. B. 225.

(c) (1882), 8 Q. B. D. 459, 464. See *R. v. Bethnal Green Vestry* (1875), 32 L. T. (N.S.) 558.

(d) (1855), 24 L. J. Ch. 332, 338.

(e) [1891] A. C. 455, 458, Lord Halsbury, L.C.

any person of any nationality committing bigamy in any part of the world might be tried for bigamy in the colony.

But in a similar case, *R. v. Russell* (*f*), on the words of section 57 of the offences against the Person Act, 1861, "whether the second marriage shall have taken place in England or Ireland, or elsewhere" and it was contended that the last word did not apply to a second marriage in the United States of America but must be construed to mean "elsewhere within the United Kingdom or the King's Dominions," the House of Lords rejected this contention.

Similarly in a series of cases relating to the right to vote and to hold public offices it has been held that such general terms as "any person" or "any man" did not include females, as it could not have been intended by such an expression to extend these rights to females (*g*).

(*f*) [1901] A. C. 446.

(*g*) See *R. v. Harrald* (1872), L. R. 7 Q. B. 361; *Chorlton v. Lings* (1868), L. R. 4 C.P. 374; *Beresford Hope v. Sandhurst* (1889), 23 Q. B. D. 79; *Viscountess Rhondda's Claim*, [1922] A. C. 339, but for a contrary construction see *Edwards v. Att.-Gen. of Canada*, [1930] A. C. 124, 143, where the cases relating to sex incapacity are reviewed. The question there was as to section 24 of the British North America Act, 1867, and it was held that those provisions ought to be given "a large and liberal interpretation, so that to a certain extent the Dominion may be mistress in her own house." "Persons" in the section therefore included women. It was pointed out that in England women were formerly under a Common Law Disability to hold public office.

CHAPTER VI

EFFECT OF ONE PART OF A STATUTE UPON THE CONSTRUCTION
OF THE OTHER PARTS

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Parts of a statute.

1. An Act of Parliament at the present day (a) consists of the following parts, viz.:—

1. The day of its receiving the royal assent.
2. The title.
3. Marginal notes and punctuation.
4. The preamble.
5. Headings.
6. The interpretation clauses.
7. The enacting clauses.
8. The schedules.

It is, of course, often the case that an Act of Parliament consists merely of one or more enacting clauses, and has no headings, interpretation clause, schedules, or even preamble.

(a) As to when the present form of statute was first adopted, see May, 15th ed. 494, 834; and pp. 18 ff *ante*.

Royal Assent.

2. The date on which an Act receives the royal assent is made part of the Act by the Acts of Parliament (Commencement) Act, 1793 (*b*).

Title.

3. Modern statutes generally contain both a long and a short title. The House of Lords now requires all Acts to have both a short and a long title. It was said by Treby, C.J., in *Chance v. Adams* (*c*), that "no titles at all were put in statutes until 11 Hen. 7 (1495)" (*d*). "In the fifth year of Henry VIII it first became the custom to put a distinct title to every particular chapter of a statute. The subdivision of statutes into chapters must be understood to have been perfectly arbitrary. The same may be predicted of the titles prefixed to the chapters, which have often been the mere invention of modern editors" (*e*). In *Birtwhistle v. Vardill* (*f*), Tindal, C.J., said, with reference to ancient statutes: "No more argument can be justly built upon the title prefixed to the statute in some of the modern editions of the statutes than upon the marginal notes against its different sections."

In *Claydon v. Green* (*g*), Willes, J., after explaining how Bills were formerly engrossed upon one or more Rolls of Parliament, a practice discontinued since 1849 (*h*), said: "I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the Act, the marginal notes, and the punctuation, not as forming part of the Act, but merely as a *contemporanea expositio*. The Act when passed must be looked to just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order, in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament."

This opinion of Willes, J., is in accord with a series of earlier decisions (*i*). It does not wholly exclude reference to the long title; but other Judges have differed from him as to the extent to which the

(*b*) 33 Geo. 3, c. 13, see p. 48 *ante* and Part II, ch. vi. "Commencement and Duration of Effect of Statutes."

(*c*) (1696), 1 Ld. Raym. 77, 78.

(*d*) *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895, 945, Lord Brougham; and see Bacon, Abr. tit. Statute A; but see 3 Hen. 7, 1 Rev. Stat. (2nd ed.) 228.

(*e*) Dwaris, p. 463; 1 Bl. Comm. 183.

(*f*) (1840), 7 Cl. & F. 895, 929.

(*g*) (1868), L. R. 3 C. P. 511, 522.

(*h*) Bills as soon as passed are now printed on vellum by the King's printer; May, 15th ed., p. 575.

(*i*) In *Powler's Case* (1611), 11 Co. Rep. 29 a, 33 b, Lord Coke said: "As to the style or title of the Act, that is no parcel of the Act, and ancient statutes are without any title; and many Acts are of greater extent than the titles are." In *Att.-Gen. v. Lord Weymouth* (1743), Ambler 20, 22, Lord Hardwicke said: "The title is no part of the Act." See also *Mills v. Wilkins* (1704), 6 Mod. 62, Holt, C.J.; *R. v. Williams* (1791), 1 W. Bl. 93, 95 Lord Mansfield; *Hunter v. Nockolds* (1849), 1 Mac. & G. 640, 651, Lord Cottenham; *Birtwhistle v. Vardill*, *supra*; *Allkins v. Jupe* (1877), 2 C. P. D. 375, 385.

long title may be used as a guide to construction. In *Brett v. Brett* (*k*), the question was whether the expression "any will or codicil," when used in 25 Geo. 2, c. 6 (*l*), related to all wills and codicils, or only to those of real estate. The title of that Act was "An Act for putting an end to certain doubts relating to the attestation of wills and codicils of real estate," and Sir John Nicholl, M.R., held that the title might be taken into consideration in deciding the question, and that since the Act professed by its title to relate only to wills and codicils of real estate, it must be held to be confined to such, and not to affect wills or codicils of personal estate. "If that had been the true construction," said he, "the title of the Act should at least, not to say must, have been different. But the title of an Act of Parliament is settled with some solemnity (*m*); and this, too, after it becomes an Act—that is, after the question put, whether the Bill shall pass, and that question carried in the affirmative. This seems to imply that, in whatever sense the phrase was understood by the framer of the Bill, the sense in which it was understood by the Legislature, and in which the Court consequently is bound to construe it, is that of a will or codicil of real estate" only.

The two following cases are good examples of the way in which the title of an Act is allowed to operate upon its construction. In *Shaw v. Ruddin* (*n*), the question was whether section 25 of the Dublin Carriages Act, 1853, applied to carts used for private purposes only. The title of the Act is "An Act to consolidate and amend the laws relating to hackney and stage carriages, also job carriages and horses and carts let for hire within the police district of Dublin." Lefroy, C.J., said in his judgment: "Now the title of the Act . . . shows that the Legislature intended to make regulations with respect to carriages and other vehicles let for hire. It is quite true that, although the title of an Act cannot be made use of to control the express provisions of the Act, yet if there be in these provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered, in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent rather than at variance with the clear title of the Act." In *Ex p. Steavenson* (*o*), a *quo warranto* was moved against certain municipal officers, who, having been elected in September, 1822, had neglected to take the oaths of allegiance, etc., as required by the Tests and Corporation Acts, within six months. By the Annual Indemnity Act (4 Geo. 4, c. 1) passed in February, 1823, indemnity was afforded to those who had omitted to qualify for offices or employment. It was contended that this Act only applied to persons who, "at or

(*k*) (1826), 3 Addams 210, 218.

(*l*) Repealed 7 Will. 4 & 1 Vict. c. 26, s. 2, except as to American colonies and as to wills made before 1838.

(*m*) See note (*r*), p. 181, *post*.

(*n*) (1859), 9 Ir. C. L. R. 214, 219.

(*o*) (1823), 2 B. & C. 34, 37.

before the passing of the Act," had incurred penalties, and that as these persons were only elected in September, 1822, they had not incurred any penalties by February, 1823, when the Act passed, and consequently could not be protected by it. But on the other side it was urged that from the title of the Act it was clear that it was the intention of the Legislature that the indemnity should extend to them. And it was so held by the Court: "There may, perhaps, be some obscurity in the words of the statute, but there is none in the title, and this being a remedial statute, we should construe it so as to give full effect to the intention of the Legislature." In *East and West India Dock Co. v. Shaw, Savill and Albion Co.* (p), Chitty, J., said that the full title might "be referred to for ascertaining generally the scope of the Act," and in *Kenrick & Co. v. Lawrence & Co.* (q), a case on the Copyright (Works of Art) Act, 1862, which has a statutory short title, Wills, J., referred to the full title to elucidate an ambiguity, and he pointed out that this course had been taken in *Blake v. Midland Ry.* (r). "As far," he said, "as it goes, the title would certainly seem to point to the notion that it is the product of the artistic faculty which is the primary thing to be protected. And although it might not be right on that account to cut down the generality of the expression 'every drawing,' yet it may serve to point to the character of a production."

The long title as part of a modern statute. The old opinion that the long title is not part of the statute is no longer tenable, owing to changes in Parliamentary procedure for dealing with titles. The title is now regarded as an important part of the Act. In *Jefferies v. Alexander* (s) Lord Cranworth said that though the question as to the title of an Act is put from the chair in the House of Commons, it was never put in the House of Lords. But under the present procedure, in both Houses titles are now the subject of amendment (t). The full title is "always on the roll" (u), and may, like the preamble, "be looked at in order to remove any ambiguity in the words of the Act" (x). In *Fielding v. Morley Corporation* (y), Lindley, M.R., in construing the Public Authorities Protection Act, 1893, referred to the full title and continued: "I read the title advisedly, because now and for some years past the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law-books

(p) (1888), 39 Ch. D. 524, 531.

(q) (1890), 25 Q. B. D. 99, 104.

(r) (1852), 18 Q. B. 93.

(s) (1860), 8 H. L. C. 594, 603, note (h).

(t) The last question to be determined in the House of Commons is that this be the title of the Bill, which is accordingly read by the Speaker. Amendments may then be offered to the title: May, 15th ed., p. 529. In the House of Lords the title may be amended at any stage during the progress of a Bill: May, 14th p. 475; Standing Orders, House of Commons, 1948: Roscoe, Nisi Prius (20th ed.) 107.

(u) *Sutton v. Sutton* (1882), 22 Ch. D. 511, 513, Jessel, M.R.

(x) *Coomber v. Berks JJ.* (1882), 9 Q. B. D. 17, 33, Huddleston, B.

(y) [1899] 1 Ch. 1, 4; affd. [1900] A. C. 133, cf. *Galloway v. Irish Sailors' and Soldiers' Land Trust* (1950) N. I. 32, 45 Andrews, C.J.

we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament" (z). In *Dartford Rural District Council v. Bexley Heath Ry.* (a), the Earl of Halsbury, L.C., in order to determine the scope of the Railways Clauses Act, 1845, took into consideration not only the preamble but also the title of the statute (b). And in *Fenton v. Thorley* (c), a case on the Workmen's Compensation Act, 1897, Lord Macnaghten said: "It has been said that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful Judge (d), 'the title of an Act is no part of the law, but it may tend to show the object of the Legislature. . . .' Surely, if such a reference is ever permitted, it must be permissible in a case like this, where Parliament is making a new departure in the interest of labour, and legislating for working men presumably in language that they can understand." Lord Moulton in *Vacher v. London Society of Compositors* (e), said: "The title is part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope." But a title is never allowed to affect or restrain the plain meaning of a statute but only to act as an aid in resolving a difficulty (f).

Short title as part of an Act. "Every Act of Parliament," says Lord Thring (g), "should have a short title, ending with the date of the year in which it is passed. . . . For although Lord Brougham's Act, 13 & 14 Vict. c. 21 (h), enables reference to be made to a particular statute without mentioning its title, it is very inexpedient to do so, as the mere mention of a particular chapter fails to convey to the mind of the reader any idea of the Act referred to, and mistakes often arise from a misprint in the number of a chapter"; and this is now the established method of drafting. Where Acts contain a section enacting that the Act may be cited by some short title, such a section may be cited as proof of the intention of the Legislature, so as "to make that

(z) Followed in *R. v. Cockerton* (1901), 17 T. L. R. 165. The same rule is observed in Canada: *O'Connor v. Nova Scotia Telephone Co.* (1893), 22 Canada 276, 291; cf. *R. v. Washington* (1881), 46 Upp. Can. Q. B. 221; *Re Ontario Medical Act* (1896) 13 O. L. R. 501, 504. In *The Ydun*, [1899] P. 230, 236, Jeune, P., erroneously referred to *Fielden's Case* (*supra*) as dealing with the "short title" of the Act.

(a) [1898] A. C. 210, 212.

(b) There is one Act of Parliament (31 & 32 Vict. c. 89) in which, unless the title be taken as an integral portion of the Act, the first section will be unintelligible. The title of the Act is "An Act to alter certain provisions in the Acts for the commutations of tithes, the Copyhold Acts, and the Acts for the inclosure, exchange, and improvement of land. . . ." The Act then goes on thus: "Be it enacted, &c., 1. That notwithstanding any provisions in the *said* Acts contained, &c." It is obvious that, unless the title be treated as part of the Act, the first section would have no meaning at all.

(c) [1903] A. C. 443, 447.

(d) Wightman, J., in *Johnston v. Upham* (1859), 2 E. & E. 250, at p. 263.

(e) [1913] A. C. 107, 128.

(f) *Sage v. Eicholz*, [1919] 2 K. B. 171; *R. v. Stoddart*, [1901] 1 K. B. 177.

(g) Thring, p. 37.

(h) Superseded by s. 35 of the Interpretation Act, 1889, *post*, Appendix B.

short title a good general description of all that was done by the Act" (i). The short titles given by the Short Titles Act, 1896, would appear to come within this decision when as usual the short titles are parts of the Acts. Reference to the long or short titles of a statute for purposes of interpretation must always be secondary to reference to the enacting part, for the title may be colourless (k), or the Act may deal with subjects not expressed in the title (l).

Marginal notes and punctuation.

4. *Marginal notes.* The old view was that the marginal notes do not form part of any Act, and though they now appear on the rolls of Parliament, can afford no aid to its construction at least in a general Act (m). But in *R. v. Milverton (Inhabitants)* (n) it was held that a marginal note to a form in the schedule of 13 Geo. 3, c. 78, "which is not merely found in the printed Act, but in the Parliament Roll," was part of the Act and should receive its full effect. In *Sheffield Waterworks v. Bennett* (o), Cleasby, B., said that "one may refer to the marginal reference in considering the general sense in which words are used in Acts of Parliament." And in *Venour v. Sellon* (p), Jessel, M.R., referred to the marginal note of 19 & 20 Vict. c. 120, s. 14, in support of the view which he took of the meaning of the section. "This view," said he, "is borne out by the marginal note, and I may mention that the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts, and in fact are so clearly so that I have known them to be the subject of motion and amendment in Parliament" (q). But Baggallay, L.J., in *Att.-Gen. v. G. E. Ry.* (r), said: "I never knew an amendment set down or discussed upon the marginal notes to a clause. The House of Commons never has anything to do with a marginal note." Acting apparently on this view of the law, the editor of the first Revised Edition of the Statutes (as he stated in the preface to vol. xi) revised the marginal notes throughout the edition, and the same process was adopted in the second and third editions (s).

It is not uncommon for the marginal note to an Act to refer to matters struck out of the Bill in its passage through Parliament. Thus, section 1 (2) of the Married Women (Maintenance in Case of Desertion) Act, 1886, had a marginal note as to the custody of children, though

(i) *Middlesex Justices v. R.* (1884), 9 App. Cas. 757, 772, Lord Selborne.

(k) *R. v. West Riding County Council*, [1907] A. C. 29; [1906] 2 K. B. 670, 711. Farwell, L.J.

(l) See *R. v. Washington* (1881), 46 Upp. Can. Q. B. 221, 225, Osler, J.

(m) *Claydon v. Green* (1868), L. R. 3 C. P. 511, p. 179 ante.

(n) (1836), 5 A. & E. 841, 854.

(o) (1872), L. R. 7 Ex. 409, 421.

(p) (1876), 2 Ch. D. 522, 525.

(q) Jessel, M.R., withdrew this opinion in *Sutton v. Sutton* (1882), 22 Ch. D. 511, 513: "The dictum in that case is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll."

(r) (1879), 11 Ch. D. 449, 461; cf. *R. v. Hare*, [1934] 1 K. B. 354, 355, Avory, J.

(s) See Preface to the Third Edition, vol. 1, p. xi.

the text was silent on the subject. With reference to the Railways Clauses Act, 1845, Bramwell, L.J., said in *Att.-Gen. v. G. E. Ry.* (r): "What would happen if the marginal note differed from the section, which is a possibility, as is shown in section 112 of this Act? Does the marginal note repeal the clause, or the clause the marginal note?"

In a local Act, the Woking Urban District Council (Basingstoke Canal) Act, 1911, certain sections of the Act were referred to in a later section by their marginal notes, and Phillimore, L.J. (u), said: "I am aware of the general rule of law as to marginal notes, at any rate in public general Acts of Parliament; but that rule is founded, as will be seen on reference to the cases, upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons. Where, however, as in section 10 of this Act, and in some other recent local and personal Acts which have come under my cognisance, the marginal notes are mentioned as already existing and established, it may well be that they do form a part of the Act of Parliament."

The modern cases however are clear that marginal notes can afford no legitimate aid to construction. It is true that Collins, M.R., thought some help might be derived from the side-note to section 11 of the Licensing Act, 1902 ("though of course it is not part of the statute") to show what the section was dealing with (x). On the other hand, Scrutton, L.J., in *Wilkes v. Goodwin* (y), was of opinion that the trial Judge had relied too much on side-notes in construing sections 9 and 10 of the Increase of Rent Act, 1920. "The side-notes are not part of the Act and I believe are not considered or amended by the Legislature." Lord Macnaghten in the Privy Council considered it well settled that the marginal notes cannot be referred to for purposes of construction (z), and more recently Lord Hanworth, M.R., referring to the Superannuation Act of 1859, said: "It was contended that these catchwords could be used to explain the meaning of sections upon which they appear. As explained by Baggallay, L.J., in *Att.-Gen. v. G. E. Ry.*, (*supra*) marginal notes are not part of an Act of Parliament. The Houses of Parliament have nothing to do with them, and I agree with the learned Lords Justices in that case that the Courts cannot look at them" (a).

Punctuation. In *Stephenson v. Taylor* (b), Cockburn, C.J., said: "On the Parliament Roll there is no punctuation, and we therefore

(r) (1879), 11 Ch. D. 449, 460.

(u) *Re Woking Urban District Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300, 322.

(x) *Bushell v. Hammond*, [1904] 2 K. B. 563, 567.

(y) [1923] 2 K. B. 86, 100.

(z) *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (1904), L. R. 31 I. A. 132, 142; cf. the doubt recently expressed by Lord Goddard, C.J., in *R. v. Surrey (N. E. Area) Assessment Committee*, [1948] K. B. 28 at p. 32.

(a) *Nixon v. Att.-Gen.*, [1930] 1 Ch. 566, 593. *Longdon-Griffiths v. Smith* [1950] 2 A. E. R. 662, 672, Slade, J.

(b) (1861), 1 B. & S. 101, 106.

are not bound by that in the printed copies" (c). This statement seems to be also applicable to the vellum prints. The copies printed on vellum since 1850 are certainly in some cases punctuated, but punctuation is discouraged by the Parliamentary officials owing to the difficulties which arise when the punctuation is not altered to give effect to amendments made in committee. Punctuation when it occurs in the vellum copies is, it is submitted, to be regarded, to some extent at least, as *contemporanea expositio* (d). The King's Printer's copies of modern Acts are punctuated in the normal way but punctuation forms no part of any Act (e). In *Barrow v. Wadkin* (f) the question arose whether the words in 13 Geo. 3, c. 21, s. 3, were to read "aliens' duties, customs and impositions," or "aliens, duties, customs and impositions." "I supposed," said Romilly, M.R., "I should not learn much on the subject from the inspection of the Roll of Parliament (g), but as it was in my custody I have examined it. It seems that in the Rolls of Parliament the words are never punctuated, and accordingly, very little is to be learnt from this document."

Construction where no punctuation. One of the effects of the original statutes not being punctuated is that it is often difficult to decide whether words apply only to a particular branch of a sentence, and are to be read distributively, *reddendo singula singulis* as it is called, or whether they govern the whole sentence. It does not appear that any definite rule can be laid down as to this; but, as Dwarries says as to this point (h), "the intention must be collected from the context to which the words relate." Thus, it was held in *Badger v. South Yorkshire Ry.* (i), that the word "purchase," as used in a local Act (12 Geo. 1, c. 38, s. 2), may "be applicable, *reddendo singula singulis*, to the other purposes for which the acquisition of the soil is certainly necessary"; and in *Phillips v. Highland Ry.* (k) it was held that section 189 of the Merchant Shipping Act, 1854 (l), must be so read.

In *Duke of Devonshire v. O'Connor* (m), which turned on the construction of an exception contained in an enclosure Act (38 Geo. 3, c. 18), Lord Esher, M.R., said: "It has been said that there are brackets in it, but that we must read it as though the brackets were removed to some other part of the clause. But if notice is to be taken of the brackets, it must be subject to the language used, and then it

(c) This is not strictly accurate. On examination of the enrolment of the Treason Act, 1351 (for the purposes of *R. v. Lynch*, [1903] 1 K. B. 444), some punctuation was found.

(d) See pp. 76 *et seq. ante*.

(e) *Duke of Devonshire v. O'Connor* (1890), 24 Q. B. D. 468, *infra*.

(f) (1857), 24 Beav. 327, 330.

(g) The document referred to by Lord Romilly seems to be the Chancery Roll, and not the Parliament Roll of the Statutes. See p. 42 *ante*.

(h) 2nd ed., p. 601.

(i) (1858), 1 E. & E. 359, 364, Williams, J. Cf. *Bishop v. Deakin*, [1936] 1 Ch. 409, 414, Clauson, J.

(k) (1883), 8 App. Cas. 329, 336.

(l) Repealed and re-enacted in the Merchant Shipping Act, 1894, s. 165.

(m) (1890), 24 Q. B. D. 468, 478.

may be shown that either at both ends or at one end of the parenthesis the bracket must have been erroneously placed, and that the brackets must be put in the right place according to the sense and construction of the language used. To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."

The punctuation in the octavo and quarto editions between 1896 and 1907 differs, because they were under different editors. The quarto followed the original Bill on the Parliament Rolls, and the octavo the deliberate judgment of the editor. It is believed that since 1907 both editions follow the punctuation of the Clerk of Public Bills.

The preamble.

5. *Object of preamble.* Preambles, especially in the earlier Acts, have been regarded as of great importance as guides to construction. They set out the facts or state of the law for which it is proposed to legislate by the statute. Most modern statutes have very short preambles or none at all. Lord Alverstone, C.J., said in *L. C. C. v. Bermondsey Bioscope Co.* (n): "I quite recognise that the title of an Act is part of the Act and that it is of importance as showing the purview of the Act: and I may express in this connection my regret that the practice of inserting preambles in Acts of Parliament has been discontinued as they were often of great assistance to the Courts in construing the Acts." And Lord Macnaghten: "Nowadays when it is a rare thing to find a preamble in any public general statute, the field of enquiry is even narrower than it was in former times" (o).

"The preamble of the statute," says Coke, in 1 Inst. 79a, "is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof." And in 1 Litt. 11b he says: "From statutes his [Littleton's] arguments and proof are drawn first from the rehearsal or preamble of the statute." "The proper function of a preamble," says Lord Thring (p); "is to explain certain facts which are necessary to be explained before the enactments contained in the Act can be understood; for example, the Courts of Justice Building Act, 1865, proposed to apply certain funds to the payment of the expenses of constructing new Courts of Justice (q). Accordingly, a long preamble was prefixed to the Act, explaining the origin of these funds, for without such a preamble it would have been impossible for Parliament to have understood the subject-matter of the Act" (r).

(n) [1911] 1 K. B. 445, 451.

(o) *Vacher v. London Society of Compositors*, [1913] A. C. 107, 118.

(p) Thring, p. 92.

(q) The preamble to 5 Geo. 3, c. 26, recites the title to the Isle of Man during 300 years, and extends over eighteen pages. These long preambles were sometimes very useful—*Belasco v. Hannant* (1862), 3 B. & S. 13.

(r) In the case of public Bills, preambles are now often superseded by a memorandum or breviat explaining the object of the Bill; see p. 123, *ante*.

The preamble of a public Bill is usually considered last in committee, and amended to correspond with the clauses as settled in committee (s).

Preamble in Private Bill. By the Standing Orders of both Houses all Acts which fall within the Parliamentary description of private Bills are required to have preambles, and the petitioners are required to prove the preamble, which is needed to explain the reasons for the exception sought to be made to the general law, and to justify Parliament in granting the exceptional powers sought for.

It is the duty of a select committee on a private Bill to report (r) that the allegations of the Bill (*i.e.*, the contents of the preamble) have been examined (u), and also as to any alterations made by the committee in the preamble, and the ground of making them (x). It may fairly be contended that, in view of the Standing Orders, the recitals of the preamble of a private Act should be treated by the Courts as conclusive as between the parties to the Parliamentary bargain contained in the Bill and as to the public utility of passing the Bill, inasmuch as they are not adopted without examination of witnesses, and in many cases after prolonged opposition and argument, before a select committee (*vide post*, Part IV).

Judicial inquiry into preambles of Private Bills. Evidence in proof of the preambles of private Bills in the Lords used to be taken by the Judges, to whom petitioners for private Bills were referred to hear the parties and report to the House the state of the case and their opinion thereon. The witnesses heard before the Judges were sworn at the Bar of the House of Lords if the Bill related to landed estate, but by the Witnesses on Petitions Act, 1801, Scotch and Irish Judges have power to administer an oath on the reference of a Bill to them (y). Since 1843 the Judges do not take evidence, and the only Bills referred to the Judges are estate Bills (which always originate in the House of Lords), and of those, only such as have not been previously approved by the High Court of Justice (Chancery Division (z)).

Preamble is integral part of statute. Lord Holt is reported to have said, in *Mills v. Wilkins* (a), that "the preamble of a statute is no part thereof, but contains generally the motives or inducements thereof"; but this *dictum* is not in accordance with the opinion held at the present day. "The preamble," said Pollock, C.B., in *Salkeld v. Johnson* (b), "is undoubtedly part of the Act." So also, in *Davies v. Kennedy* (c), Christian, L.J., said: "The preamble, which of course is a most important part of the statute is no less explicit."

(s) 2 Cliff. 864; see note (t) p. 181 *ante*.

(r) Standing Orders of the House of Commons, 1948.

(u) May, 15th ed., p. 947.

(x) May, 15th ed., p. 959.

(y) 2 Cliff. 768.

(z) *Ibid.* 770; S. O. (H. L.) Private Bills, 126, 127, 128 (1945).

(a) (1704), 6 Mod. 62.

(b) (1848), 2 Ex. 256, 283.

(c) (1869), Ir. R. 3 Eq. 668, 697.

✓ *Where the language of the enactment is clear the preamble must be disregarded.* Whether the preamble be considered as an integral part of the statute or not, the general rule with regard to its effect upon the enacting part of the statute has always been that if the meaning of the enactment is clear and unequivocal without the preamble, the preamble can have no effect whatever. In the *Sussex Peerage Claim* (d) the Judges enunciated the rule as follows: "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (e), is 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress'" (f).

This rule was thus stated in *Powell v. Kempton Park Racecourse Co.* (g) by the Earl of Halsbury: "Two propositions are quite clear, one that a preamble may afford useful light as to what a statute intends to reach, and the other that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." And Lord Davey in the same case said: "But, further, I am of opinion that the argument itself is illegitimate if it is sought thereby to cut down the language of the enactment according to its plain and natural meaning or to restrict the enactment to the particular matter set forth in the preambles. 'Undoubtedly'—I quote from Chitty, L.J.'s judgment words with which I cordially agree—'it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.' But the preamble is the key (h) to the statute, and affords a clue to the scope of the statute, where the words construed in themselves without the aid of the preamble are capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and the general intention of the Legislature" (i). And Lord Blackburn in deciding upon the meaning of Sturges Bourne's Act (59 Geo. 3 c. 12), as to the rating of small tenements in *West Ham Assessment Committee v. Iles* (k), said: "I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect

(d) (1844), 11 Cl. & F. 85, 143.

(e) In *Stowel v. Lord Zouch* (1562), Plowd. 369.

(f) Quoted and approved by Lord Halsbury, L.C., in *Income Tax Commissioners v. Pemsel*, [1891] A. C. 531, 542. As to recitals, see p. 192 post.

(g) [1899] A. C. 143, 157.

(h) Cf. *Halton v. Cove* (1830), 1 B. & Ad. 538, 558, Lord Tenterden, C.J., adopted by Lord James in *Powell v. Kempton Park Racecourse Co.*, *supra* at p. 193.

(i) *Powell v. Kempton Park Racecourse Co.*, *per* Lord Davey, *supra* at p. 184.

(k) (1883), 8 App. Cas. 386, 388, 390.

to the preamble to this extent, namely, that it shows us what the Legislature are intending, and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer to the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material." In that case it had been contended that the construction adopted by the Court would "baffle the preamble" (l). And Lord Davey in *Powell v. Kempton Park Racecourse Co.*, said: "It may well be in this and other cases that the Legislature taking the recited facts as the occasion of the enactment, have deliberately used large words to prevent the same kind of mischief in other forms" (m).

If the language of the enactment is not clear the preamble may be resorted to. As the dicta just cited show, if the object or meaning of an enactment is not clear, "the preamble," as Buller, J., said in *Crespigny v. Wittenoom* (n), "may be resorted to to explain it" (o).

Limitation of application of Act by resort to preamble. If very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply. The case of *L'Apostre v. Le Plaistrier* (1708), cited in *Copeman v. Gallant* (p), turned upon 21 Jas. 1, c. 19, ss. 10, 11, which read: "And for that bankrupts frequently convey over *their* goods and yet continue in possession and dispose of them, be it enacted

(l) Cf. *Richards v. Scarborough Market Co.* (1854), 23 L. J. Ch. 110, 114, Knight Bruce, L.J.; *Hughes v. Chester Ry.* (1861), 31 L. J. Ch. 97, 100, Channell, B.

(m) [1899] A. C. 143, 185. The case of *Wilson v. Knubley* (1806), 7 East 127, gives a good illustration of the operation of this rule. The preamble of 3 Will. & Mary, c. 14, recites that "it hath often happened that several persons, having by bonds and other specialities bound themselves and their heirs, have to the defrauding of such their creditors devised their lands"; then by s. 2 it is enacted that all such devices against creditors shall be absolutely void; and by s. 2 it is further enacted that "all such creditors shall have their *actions of debts* upon such bonds against the devisees." The plaintiff in the action in question had by virtue of this statute sued the defendant, who was a devisee, but the action was of covenant and not of debt, wherefore it was contended by the defendant that the action would not lie. Lord Ellenborough, C.J., in deciding in accordance with the defendant's contention, said (pp. 133—134): "I agree with the plaintiff's counsel. that the grievance recited in the preamble would have led one to suppose that the Legislature meant to have given a larger remedy than the action of debt. . . . If it had only said that they should have their *actions* without more, there would have been ground for going the length of the argument of the plaintiff's counsel; but the Legislature has expressly limited the means of recovery by such creditors to *actions of debt*. . . . To extend it, therefore, to the action of *covenant* would be to legislate and not to construe the Act of the Legislature." In *Dean of York v. Middleburgh* (1827), 2 Y. & J. (Ex.) 196, 215, Alexander, C.B., said: "What right have I to say that where the Legislature has enacted a prohibition in general terms more extensive than the preamble, that it did not mean that these terms should have their full and natural effect?" This rule applies even in criminal cases. Thus it is stated by Lord Hardwicke, in *Kinaston v. Clarke* (1741), 2 Atk. 204, 205, that the Offences at Sea Act, 1536 (28 Hen. 8, c. 15), extends to trials in the West Indies.

(n) (1792), 4 T. R. 790, 793.

(o) Cf. *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, 218, Farwell, L.J. (p) (1716), 1 P. Wms. 314.

that if at any time hereafter any person shall become bankrupt and at such time shall by the consent and permission of the true owner have in their possession, order, and disposition *any* goods or chattels . . . that in every such case the commissioners shall have power to sell and dispose of the same for the benefit of the creditors. . . .” The plaintiff had delivered to one Levi (who afterwards became bankrupt) a parcel of diamonds to sell for him, and these diamonds were at Levi’s bankruptcy seized by the defendants for the creditors by virtue of this statute, as being goods in the possession of the bankrupt at the time of his bankruptcy. But it was held by Lord Holt that these diamonds were not liable to be seized as the property of the bankrupt, and that the general words of the clause ought to be explained and limited by the words of the preamble, “their goods.” This decision, though not acquiesced in by Lord Cowper (q) was subsequently approved by Parker, C. B. in *Ryall v. Rolle* (r) when he said as follows: “It has been laid down on the construction of 13 Eliz. c. 5, that the preamble shall not restrain the enacting clause. But I take it to be agreed that if the non-restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it, and this is the case here, for otherwise merchants could not correspond or carry on their business without great danger and great difficulty.” And Lord Hardwicke added: “I am strongly inclined to be of opinion, with Lord Chief Justice Holt and my Lord Chief Baron Parker, that this clause is to be restrained by the preamble, and differ from Lord Cowper in the case of *Copeman v. Gallant*.” So also in *Brett v. Brett* (s) Sir John Nicholl, M.R., is reported to have held that, inasmuch as it clearly appeared from the preamble that 25 Geo. 2, c. 6 (t), only professed to deal with wills and codicils devising real estate, the expression “any will or codicil,” whenever used in the Act, meant only a will or codicil which devised real estate, and in no way affected any will or codicil which bequeathed personalty.

On the other hand the preamble may be narrow but the enacting words large and the preamble will be consequently extended. Thus the 4 & 5 Ph. & M. c. 8, (1557), made the abduction of all girls under the age of sixteen penal although the preamble only referred to heiresses and other rich girls. The Transportation Act, 1824 recited that transported felons in New South Wales, after obtaining remissions of their sentences, sometimes “of their own industry acquired property in the enjoyment of which it was expedient to protect them” and enacted that any such felon should be entitled to sue for the recovery “of any property, real or personal, acquired since his conviction.” The enacting words were held not to be limited by the preamble to property acquired by the felon’s own exertions but were to extend to

(q) In *Copeman v. Gallant*, *supra*.

(r) (1749), 1 Atk. 164, 174, 182.

(s) (1823), 3 Addams 219.

(t) See p. 180 *ante*.

e.g. property acquired by inheritance (*u*). "If the enacting words can take it in (the mischief which the statute was intended to remedy), they shall be extended for that purpose though the preamble does not warrant it" (*x*).

Court to decide whether Act sufficiently explicit by itself. It must always be a question of some nicety for the Court to determine whether an Act is sufficiently explicit by itself or whether the preamble should be looked to for aid in explanation of it. Thus in *Davies v. Kennedy* (*y*) Christian, L.J., put a restrictive meaning upon the word "banker" as used in 33 Geo. 2, c. 14 (Irish), and in support of his view of the meaning of the word he relied largely upon the preamble of the Act. In the House of Lords however, on appeal, Lord Chelmsford said: "Undoubtedly if there is any ambiguity in the language of the enactments, the preamble might be used as an interpreter, but plain and unambiguous words must receive their full sense and cannot be restrained by the preamble; for where an Act is introduced to remedy a particular mischief, that object may be recited in the preamble and then the Act may go on to provide generally against all mischiefs of a similar nature." The enactment was held here not to be controlled by the preamble (*z*). On the other hand in *Winn v. Mossman* (*a*) a question arose upon the meaning of 24 & 25 Vict. c. 75, s. 4, (1861) (*b*), by which it was enacted that "in the construction of 9 Geo. 4, c. 61, the words 'town corporate' shall include every borough having a separate commission of peace, although it may not have a separate Court of quarter sessions." The Act of 9 Geo. 4 dealt with two different matters—namely, the application of penalties recovered under the Act and the granting of licences, and inasmuch as it was stated in the preamble of the Act of 1861 that doubts have arisen whether the boroughs in question come within the Act of 9 Geo. 4 "so as to give the justices of such boroughs control over the granting of licences," but no allusion was made in the preamble to the other subject dealt with in the Act—namely, the application of the penalties—it was held that the Act affected only the granting of licences, because that matter alone was mentioned in the preamble. "The words of the section," said Kelly, C.B., "are no doubt large enough by themselves to give the penalties levied under the Act to the treasurer of the borough, but when we see from the preamble that the single object of the section was to provide for the one special case of granting licences, the effect of the preamble is to control the enacting part of the section, and limit it to providing a remedy for the difficulty referred to as to the power to grant licences."

(*u*) *Gough v. Davies* (1856), 25 L. J. Ch. 677.

(*x*) *Per* Lord Hardwicke, L.C., *Basset v. Basset* (1744), 3 Atk. 203, 204, and see *Dean of York v. Middleburgh* (1827), 2 Y. & J. (Ex.) 196.

(*y*) (1869), Ir. R. 3 Eq. 668, 697.

(*z*) *Sub-nom. Copland v. Davies* (1870), L. R. 5 H. L. 358, 389.

(*a*) (1869), L. R. 4 Ex. 292, 299.

(*b*) Repealed in 1882 (45 & 46 Vict. c. 50). 9 Geo. 4, c. 61, is repealed and re-enacted in the Licensing (Consolidation) Act, 1910.

Effect of repeal of preambles. The practice of repealing the preambles of Acts which are still in force has been adopted by the Statute Law Revision Committee in deference to the desire expressed by Parliament to have a cheap edition of the existing statute law (c). But, as pointed out by Sir F. Pollock (d), the repeal or omission of preambles, unless used with consummate discretion, is likely to obscure the history and meaning of legislation out of proportion to any saving of extent and bulk: and the repeal of a preamble in no way affects the construction of the statute (e). Consequently, the second edition of the Revised Statutes, although it may become popular reading, will not be of great professional value, as it will be almost invariably necessary when any question of construction arises, to refer to the unabbreviated statute or the Statutes at Large (f).

Recitals or preambles to sections. The preamble is in the form of a recital, but some statutes also contain subsidiary preambles or recitals prefacing particular sections. With regard to such recitals the canon of construction is the same as in the case of the preamble, viz., that they may not be referred to for purposes of construction if the enacting part is clear and unambiguous (g). In *R. v. Oppenheimer* (h), Lord Reading, C.J., said: "We are entitled to consider the language of the recital (in the Proclamations), if we think there is any ambiguity in the operative part of the Proclamations." A mere recital of fact or of law is not conclusive (i) and although such may establish a *prima facie* case, it may be rebutted by evidence (k).

Headings.

6. *Headings as part of the Act.* The practice of grouping sections of an Act under different headings was first introduced in 1845 in the Clauses Consolidation Acts (l). Headings are divisible into those which can and those which cannot be grammatically read into the following sections of the statute (m). Headings of the first class are

(c) The Statute Law Revision Acts of 1890 provide for the qualified repeal of a number of preambles, and authorise their omission from the (second) Revised Edition of the Statutes. See 53 & 54 Vict. c. 33, ss. 1, 3, as to the reasons for this policy; see Ilbert, pp. 25, 71.

The Statute Law Revision Act, 1948 (11 & 12 Geo. 6, c. 62), section 1, enacts . . . "and every part of a title, preamble or recital specified after the words 'in part, namely' in connection with an Act mentioned in the said schedule may be omitted from any revised edition of the statutes published by authority after the passing of this Act."

(d) 6 L. Q. R. 472.

(e) See *Powell v. Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, 269, A. L. Smith, L.J.

(f) See pp. 33, 44, *ante*.

(g) *Crowder v. Stewart* (1880), 16 Ch. D. 368, (recitals in Hinde Palmer's Act (32 & 33 Vict. c. 46), read to show intention of Act), *Bentley v. Rotherham, etc.*, L. B. (1876), 4 Ch. D. 588, 592, Jessel, M.R. (recitals in a local Act).

(h) [1915] 2 K. B. 755, 761.

(i) *R. v. Houghton (Inhabitants)* (1853), 22 L. J. M. C. 89, 94, Lord Campbell. C.J.

(k) *R. v. Greene* (1837), 6 A. & E. 548.

(l) Thring p. 58.

(m) *Per Sir R. Collier, Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, 369.

not used in the more recent statutes. They constitute a sort of preamble prefixed to a class of clauses for the purpose of connecting those clauses with other classes of clauses (*n*). The effect of the headings used in the Clauses Consolidation Acts of 1845 has been twice discussed in the House of Lords. "These various headings," said Channell, B., in *Eastern Counties, etc. Ry. v. Marriage (o)*, "are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to to explain its enactments, but as affording as it appears to me a better key to the constructions of the sections which follow them than might be afforded by a mere preamble." The case last referred to turned upon sections 93, 94 of the Lands Clauses Consolidation Act, 1845, which are preceded by the following heading: "And with respect to small portions of intersected land, be it enacted as follows." Section 93 then begins thus: "If any land not being situated in a town," etc., and the 94th section begins: "If any such land shall be so cut through and divided," etc. "The only question," said Lord Campbell, "in this case, is whether the word 'such' in the 94th section of 8 & 9 Vict. c. 18, refers to the words 'lands not being situate in a town or built upon,' to be found at the beginning of the 93rd section of this Act, or refers to the heading which is prefixed to the two sections—'and with respect to small portions of intersected land.' The question does not depend upon any general principle of law, but on the meaning of the Legislature in the use of language never introduced into an Act of Parliament before and not likely to be repeated in any subsequent Act of Parliament." The House of Lords ultimately decided that the word "such" referred to the words used in the heading (*p*).

In *Hammersmith Ry. v. Brand (q)* the dispute turned on sections 6, 16 of the Railways Clauses Consolidation Act, 1845. Sections 6—30 are preceded by a heading in these terms: "And with respect to the construction of the railways and the works connected therewith, be it enacted as follows." These words were held by Lord Chelmsford and by Lord Colonsay to be part of the Act, and could be usefully referred to to determine the sense of any doubtful expression in any

(*n*) In *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, a case on the Waterworks Clauses Act, 1847, Farwell, L.J., said, at p. 218: "The correct view of prefatory words of this kind is expressed in Maxwell (4th ed.), p. 75, [9th ed., p. 46]. 'The function of the preamble is to explain what is ambiguous in the enactment, and it may either restrain or extend it as best suits the intention. The headings prefixed to sections or sets of sections in modern statutes are regarded as preambles to those sections.' Taking the doctrine so expressed as a guide in such a case I cannot read prefatory words of this kind so as to strike out plain words, but only for the purpose of explaining doubtful expressions in the body of a section." Cf. also Henn Collins, M.R., *ibid.* p. 213.

(*o*) (1861), 9 H. L. C. 32, 41. See also *Martins v. Fowler*, [1926] A. C. (P. C.) 746, where headings were held to be preambles to the provisions following them.

(*p*) 9 H. L. C. p. 67, Lord Campbell. 68, Lord Wensleydale.

(*q*) (1869), L. R. 4 H. L. 171.

particular section ranged under a particular heading. Lord Cairns differed from this opinion (*r*) and doubted whether the headings to different portions of a statute are to be referred to to determine the sense of any doubtful expression in a section ranged under any particular heading. He added: "In fact, one of these Acts of Parliament shows that these short headings were introduced merely to earmark a set of clauses, and to afford a short and summary way by which they might be introduced by reference as enactments into other Acts of Parliament" (*s*). The doubt expressed by Lord Cairns seems to have been confirmed recently by Lord Uthwatt (*t*). He said: "First it is said that section 83 (Housing Act, 1936) does not appear in the fasciculus of sections in Part V headed 'General Powers and Duties of Local Authorities.' That is true, but in my opinion of no weight. A heading to one group of sections cannot alter the meaning of a section outside the group. Further, the reference in section 156 (1) is not to the powers under the Housing Act, 1936 but to powers under any enactment relating to the housing of the working classes. It cannot be that this was a reference to a particular group of sections labelled 'Powers,' contained in the Housing Act 1936."

The same method of drafting was adopted in the Bankruptcy Act, 1849, and in *Bryan v. Child* (*u*) it was held that the heading to sections 133—138, "with respect to transactions with the bankrupt and executions against his property, or within a limited period previous thereto, be it enacted," must be read as embodied in each of those sections, although in some the words of enactment were repeated. Pollock, C.B., described the heading as an introductory preamble to the set of clauses. Avory, J., in *R. v. Hare* (*x*), expressed a decided opinion against the admission of headings as well as marginal notes as aids in construction. He said: "Headings of sections and marginal notes form no part of the statute. They are not voted on or passed by Parliament but are inserted after the Bill has become law. Headnotes cannot control the plain meaning of the enactment, though they may, in some cases, be looked upon in the light of preambles if there is any ambiguity in the meaning of the sections on which they throw light." More recently, Cohen, J., used the cross-section to section 10 of the Naturalization Act, 1870 ("National Status of Married Women and Infant Children") to explain the meaning of "children" in the section, *i.e.*, those under twenty-one years of age (*y*).

(*r*) *Ibid.* at p. 217.

(*s*) As to the effect of this decision, see *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205, 218, Farwell, L.J., where he rejected the authority of *Brand's Case* in the case before him "How this Court can be bound by the decision of the House of Lords on sections relating to so different a subject-matter of which the words were so different from those of the sections which we have to construe I fail to understand." Cf. note (n) p. 193, *ante*.

(*t*) *Shelley v. L. C. C.* (1948), 64 T. L. R. 600, 602.

(*u*) (1850), 5 Ex. 368, 374.

(*x*) [1934] 1 K. B. 354, 355.

(*y*) *Re Carlton*, [1945] Ch. 280, 372, where the decision was affirmed but it was held unnecessary to consider the propriety of resorting to the cross-heading.

Headings do not affect construction where clear. But the same general rule which regulates the effect of the preamble (z) applies also to these headings—namely, that they are not to be taken into consideration if the language of the enactment is clear (a). To this effect Lord Goddard, C.J., said with reference to cross-headings in the Rating and Valuation Act, 1925, “But while the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning.” The leading authority is *Hammersmith City Ry. v. Brand* (see p. 193 *ante*) and the matter has been more recently considered in *Fletcher v. Birkenhead Corpn.* (see p. 193 (n) *ante*),” (b).

Sub-headings. The practice of division into parts, now usual in all lengthy Acts, and of grouping or classifying the enactments under headings or titles, was first introduced in the Merchant Shipping Act, 1854 (c), and was derived from the Code of the State of New York. This second variety of heading is frequently used in statutes passed since 1861, and its use increases, as it facilitates reference and gives a key to the governing intention of each part of a complicated Act (d).

In the absence of specific provisions, any controversy as to whether such headings were before Parliament or inserted by the printers can only be settled, if at all, by reference to the vellum print of the Act in the custody of the Clerk of the Parliaments.

The headings are sometimes in roman and sometimes in italic letters, but the former are usually confined to stating the part of the Act, and the latter state the sub-division of the part.

It was at one time supposed that Courts of law would not recognise the division into parts or the headings as substantive parts of the Act. But they are gradually winning recognition as a kind of preamble to the enactments which they precede, limiting or explaining their operation (e).

In *Inglis v. Robertson* (f), which turned on the meaning of the Factors Act, 1889, Lord Herschell said: “The Act is divided into parts. The first, headed ‘Preliminary,’ consists of a definition clause. The last part, headed ‘Supplemental,’ contains provisions as to the

(z) See this general rule discussed pp. 187 *et seq. ante*.

(a) See pp. 63 *et seq. ante*.

(b) *R. v. Surrey (N. E. Area) Assessment Committee*, [1948] 1 K. B. 28, at p. 32.

(c) 17 & 18 Vict. c. 104, repealed by the Merchant Shipping Act, 1894, which does not contain sections specifying the subdivisions. Thring, p. 60, advises the following of the model of 1854 as putting it out of the power of Courts of law to refuse to recognise the division into parts as being a substantive part of the statute.

(d) *E.g.*, in s. 2 of the London Building Acts, 1930 (20 & 21 Geo. 5 c. clviii), 1939 (2 & 3 Geo. 6 c. xcvi).

(e) In *Lawrie v. Rathbun* (1879), 38 Upp. Can. Q. B. 255, 259, the view was expressed that the divisions under which the clauses are arranged may be looked to as a better key to construction than a mere preamble. Cf. *Att.-Gen. for Canada v. Jackson* (1945), 2 D. L. R. 438.

(f) [1898] A. C. 616, 630. Cf. also *ibid.* Lord Halsbury, L.C., at p. 624.

mode of transfer 'for the purposes of the Act' and certain savings. The other two parts are headed respectively 'Dispositions by mercantile agents' and 'Dispositions by buyers and sellers of goods.' These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them." Sometimes indeed they are inserted, as was said in *Union Steamship Co. v. Melbourne Harbour Commissioners* (g), "merely for the purpose of convenience of reference, and are not intended to control the interpretation of the clauses which follow." But the Court there added: "It may be indeed that the fact of a clause being found in a certain group may in some cases possibly throw some light on its meaning."

"Although," said Kelly, C.B., in *Latham v. Lafone* (h), in discussing section 192 of the Bankruptcy Act, 1861 (i), "we may refer to the introductory words of the section to put a construction on a doubtful part of the statute, yet if the language of the enactment is clear, and includes in express terms such a document as this [a letter of licence], we should not be justified in limiting that sense by the introductory words."

So, too, in *Lang v. Kerr, Anderson & Co.* (k) the House of Lords held that the headings in a local Act should be considered as limiting the generality of terms used in the Act as those headings were referred to in the body of the Act itself. Lord Cairns said: "These headings in this Act are not to be looked upon as marginal notes, inserted, perhaps, not by Parliament, but by the printer, because they are referred to in the body of the Act itself." And Lord Hatherley said that the parts or divisions of the Act were parts of the body of the Act itself, and not marginal notes (l).

In *R. v. Local Government Board* (m) Brett, L.J., said of the sub-headings in the Public Health Act, 1875: "I cannot come to the conclusion that the heading of a series of sections introduced into an Act of Parliament is not to be considered as part of the Act. I think that that word 'Appeal' at the head of the section may properly be considered as part, and used for the purpose of construing any doubtful matter in the sections under that very heading" (n).

(g) (1884), 9 App. Cas. 365, 369.

(h) (1867), L. R. 2 Ex. 115, 119.

(i) 24 & 25 Vict. c. 134, repealed in 1869 (32 & 33 Vict. c. 83).

(k) (1878), 3 App. Cas. 529, 536 Lord Cairns, 542 Lord Hatherley.

(l) See *Williams v. Permanent Trustee Co. of N. S. W.*, [1906] A. C. 248, 252, on the construction of a colonial Consolidation Act divided into parts; and *Saunders v. Borthistle* (1904), 1 Australia C. L. R. 379, 389, on an Act in similar form. *Hanson v. Barwise* (1930) Q. S. R., 285, 293.

(m) (1882), 10 Q. B. D. 309, 321.

(n) In *Nicholson v. Toko Reihana* (1904), 23 N. Z. L. R. 614. Cooper, J., at p. 618, said: "In ascertaining . . . the meaning of an ambiguous section in a statute, although the marginal notes to the various sections of the statute form no part of the Act, and may not be considered for the purpose of construing its provisions, a different rule applies to headings and sub-headings. These headings and sub-headings are considered part of the statute, and may materially affect its construction."

The Scottish view of these general headings was thus stated by Lord McLaren: "There are five sections in the statute under the general heading of 'Unwholesome and Adulterated Food.' I rather think that more importance has been attached by the Court to a general heading such as this than has ever been given to the side readings [marginal notes] of individual sections. Side readings are not part of the Act, but a heading such as this occurring in the text is held to be part of the Act" (o).

Interpretation clauses.

7. *May extend meaning of word.* In many modern Acts of Parliament, there is an "interpretation clause" enacting that certain words when found in the Act are to be understood in a certain sense, or are to include certain things which, but for the interpretation clause, they would not include. In the Law of Property Act, 1925, section 205 contains thirty-one clauses assigning meanings to words and expressions used in the Act. Thus, in *Cothor v. Midland Ry.* (p) the word "railway" was interpreted by section 3 of the Railways Clauses Consolidation Act, 1845, to mean "the railway and works by the special Act authorised to be constructed"; and it was held by Lord Cottenham that, by virtue of this interpretation clause, the company had power to take land compulsorily under the Act for the purpose of building a railway station.

The practice of inserting these clauses has met with judicial censure. Cockburn, C.J., said in 1865: "I hope the time will come when we shall see no more of interpretation clauses, for they frequently lead to confusion" (q). And Lord Blackburn supported "the objection of the old school of draftsmen to the introduction of interpretation clauses" (r).

There are two forms of interpretation clause. In one, where the word defined is declared to "*mean*" so and so, the definition is explanatory and *prima facie* restrictive. In the other, where the word defined is declared to "*include*" so and so, the definition is extensive. Sometimes the definition contains the words "mean and include," which inevitably raises a doubt as to interpretation (s).

Interpretation clauses frequently fall under severe judicial criticism from failure to observe the valuable rule never to enact under the guise of definition which is their chief defect. In *R. v. Commissioners under the Boilers Explosion Act*, 1882 (t), the question arose whether

(o) *Nelson v. M'Phee* (1889), 17 Rettie (Justiciary), 1, 2. See also *Scott v. Alexander* (1890), 17 Rettie (Justiciary) 35.

(p) (1847), 2 Phill. 469.

(q) *Wakefield Board of Health v. West Riding etc., Ry. Co.* (1865), 6 B. & S. 794, 801.

(r) In *Mayor, etc., of Portsmouth v. Smith* (1885), 10 App. Cas. 364, 374, but cf. *R. v. Ingham* (1864), 5 B. & S. 277.

(s) See Ilbert, p. 281. Cf. Law of Property Act, 1925, s. 205, clauses xv and xxiii.

(t) [1891] 1 Q. B. 703, 716

a steam pipe conducting steam to a pumping engine in a mine from a boiler on the surface was a boiler within the meaning of the Act above mentioned, *i.e.*, “a closed vessel for generating steam, etc.” (section 3). The Court went somewhat far in deciding that it was, and Lord Esher, M.R., said: “The draftsman has gone upon what, in my mind, is a dangerous method of drawing Acts of Parliament. He has put in a section which says that a boiler shall mean something which is in reality not a boiler. This third section of the Act is a peculiarly bad specimen of the method of drafting which enacts that a word shall mean something which in fact it does not mean.” And the same Judge said in *Bradley v. Baylis* (u), with reference to the Municipal Registration Act, 1878, and the Representation of the People Act, 1867: “It seems to me that nothing could be more difficult, nothing more involved, than these statutes, and that that difficulty arises from the fact of Parliament insisting upon saying that things are what they are not” by saying that “a dwelling-house” shall mean “a part of a dwelling-house” (x). In *Jobbins v. Middlesex County Council* (y), Scott, L.J., said that a definition section ought to be construed as not cutting down the enacting provisions of an Act unless there is absolutely clear language having the opposite effect.

Ordinary meaning not taken away by clause extending the meaning of a word. An interpretation clause which extends the meaning of a word does not take away its ordinary meaning (z). In discussing the meaning of the term “street” as used in section 157 of the Public Health Act, 1875, and interpreted in section 4, Lord Selborne said in *Robinson v. Barton Eccles Local Board* (a): “An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable. I look upon this portion of the interpretation clause as meaning neither more nor less than this, that the provisions contained in the Act as to streets,

(u) (1881) 8 Q. B. D. 195, 210, 230 (“lodger” and “occupier”).

(x) This was pointed out by Lord St. Leonards in *Dean of Ely v. Bliss* (1852), 2 De G. M. & G. 459, 471. He there said: “It has been very much doubted, and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided, for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various clauses of an Act of Parliament.” See also *per* Jessel, M.R., in Parl. Pap. 1875 (No. 208), p. 86. In *Lindsay v. Cundy* (1876), 1 Q. B. D. 348, 358, Blackburn, J., said: “An interpretation clause is a modern innovation, and frequently does a great deal of harm because it gives a non-natural sense to words which are afterwards used in a natural sense without noticing the difference.” Cf. *Wakefield v. West Riding, etc., Ry.* (1865), 6 B. & S. 794, 801, Cockburn, C.J.; *R v. Ingham* (1864), 5 B. & S. 257, 277, Blackburn, J.; *Mayor, etc., of Portsmouth v. Smith* (1885), 10 App. Cas. 364, 374, Lord Blackburn.

(y) [1949] 1 K. B. 142, 160. See also *ibid. per* Wrottesley, L.J., at p. 163.

(z) Cf. *Midland Ry. v. Ambergate, etc., Ry.* (1853), 10 Hare 359, 369.

(a) (1883), 8 App. Cas. 798, 801.

whether new streets or old streets, shall, unless there be something in the subject-matter or the context to the contrary, be read as applicable to these different things. It is perfectly consistent with that that they should be read as applicable, and should be applied, to those things to which they in their natural sense apply, and which do not require any interpretation clause to bring them in." "An interpretation clause," said Lush, J., in *R. v. Pearce* (b), "should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain," or, as Lord Coleridge said in *London School Board v. Jackson* (c), so as "to prevent the operation of a word in its primary and obvious sense." In *Nutter v. Accrington Local Board* (d), Cotton, L.J., said: "It was argued that although in other respects the place where this was done was a street, yet it was not a 'street' within the meaning of section 68 on the ground that nothing is a street within the section if it is part of a turnpike road, and for that purpose reference was made to the interpretation clause which provides as follows, . . . the interpretation clause is not restrictive. It does not say that the word 'street' shall be confined to any highway not being a turnpike road, but that it shall 'apply to and include any highway not being a turnpike road.' That is enlarging, not restricting, the meaning of 'street,' that is to say, that which, independently of the Act of Parliament, in ordinary language, is properly a street does not cease to be so because it is part of a turnpike road." In *Ex p. Ferguson* (e) a question arose as to the meaning of the enactment in section 2 of the Merchant Shipping Act, 1854, that the word "ship" shall include "every description of vessel used in navigation not propelled by oars." It was consequently contended that a fishing-boat 24 feet long, partially decked over and fitted with two masts and a rudder and also with four oars, was not a ship within the meaning of the Act, because it was propellable by oars. In deciding against this argument, Blackburn, J., said: "The argument against the proposition that this is a ship is one which I have heard very frequently, viz., that, when an Act says that certain words shall include certain things, the words must apply exclusively to that which they are to include. That is not so; the definition given of a ship is in order that the word 'ship' may have a more extensive meaning, and the words 'not propelled by oars' are not intended to exclude all vessels that are ever propelled by oars" (f).

Interpretation clauses inserted ex abundanti cautela. Sometimes a term is defined in an interpretation clause merely *ex abundanti cautela*

(b) (1880), 5 Q. B. D. 386, 389.

(c) (1881), 7 Q. B. D. 502, 504.

(d) (1879), 4 Q. B. D. 375, 384. A question on sec. 68 of the Public Health Act, 1848, vesting streets in the management of local boards.

(e) (1871), L. R. 6 Q. B. 280, 291.

(f) The same principle of interpretation was applied by Sir R. Phillimore in *The Gauntlet* (1871), L. R. 3 Ad. & E. 381, 388. Although this decision was overruled by the Judicial Committee (1872), L. R. 4 P. C. 184, this part of Sir R. Phillimore's judgment was approved.

—that is to say, to prevent the possibility of some common law incident relating to that term escaping notice. Thus in *Wakefield Board of Health v. West Riding, etc., Ry. (g)*, it appeared that by section 3 of the Railways Clauses Consolidation Act, 1845, the term “justice of the peace” is defined as “a justice of the peace acting for the . . . place where the matter requiring the cognisance of a justice shall arise, and who shall not be interested in the matter.” It was therefore argued that by this definition jurisdiction was altogether taken away from a justice who was interested in the matter, and that this objection could not be waived. But it was held that the latter words of the definition were merely declaratory of the common law, and were only added *ex abundanti cautela (h)*; “in the apprehension,” as Cockburn, C.J., said, “that justices, if not warned of what the law is, might act although interested. Had it been intended to render an interested justice absolutely incompetent, notwithstanding that both parties might waive the objection, a positive enactment to this effect would have been inserted.”

Interpretation clause not necessarily applicable on every occasion when word interpreted is used in Act. Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act, which is under consideration (*i*). “It appears to me,” said Lord Selborne in *Meux v. Jacobs (k)*, “that the interpretation clause does no more than say that, where you find these words in the Act, they shall, unless there be something repugnant in the context or in the sense, include fixtures.”

So the words “any person” in the Solicitors Act, 1932, were held not to include a body corporate, but only such person as could become a solicitor, in spite of section 2 of the Interpretation Act, which enacts that “person” shall include a body corporate “unless a contrary intention appears” (*l*). The Solicitors Act, 1934, enacts that a body corporate cannot act as a solicitor.

(g) (1865), L. R. 1 Q. B. 84, 86.

(h) “*Abundans cautela non nocet* is an old maxim of the law,” per Lord Fitzgerald in *West Riding Justices v. R.* (1883), 8 App. Cas. 781, 796.

(i) *R. v. Cambridgeshire JJ.* (1838), 7 A. & E. 491; *London School Board v. Jackson* (1881), 7 Q. B. D. 502, 504, (“parent”), Coleridge, J.

(k) (1875), L. R. 7 H. L. 481, 493.

(l) *Law Society v. United Service Bureau*, [1934] 1 K. B. 343. Cf. *Chesterman v. Federal Commissioner of Taxation*, [1926] A. C. 128.

Enacting clauses.

8. *Immaterial whether an enactment is contained in separate sections or not.* Before 1850 it was usual to preface each distinct portion of an Act by words of enactment, and the division into sections had no legislative authority. By 13 & 14 Vict. c. 21, s. 2, 1850, it was enacted that "*all Acts shall be divided into sections if there be more enactments than one*, which sections shall be deemed to be substantive enactments without any introductory words." The portion in italics has been repealed without re-enactment by the Interpretation Act, 1889 (*m*), but without any real change in the law. It was, at most, a mere direction to draftsmen and parliamentary officials without any sanction. There is not, however, any rule as to how many different sentences, each containing a substantive enactment, may be comprised in one "section," and it is clear, that whether an enactment be printed as part of one section, or contained in another section, it can make no difference in the construction of the statute (*n*).

At the end of 31 & 32 Vict. c. 119, s. 16, there was an enactment that "The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby." It was argued that, as these words stood at the end of and formed part of section 16, and were not contained in a separate section, they only applied to the subject-matter to which the previous parts of section 16 related, and that consequently section 7 of the Act of 1854 (which related to something quite different from the subject-matter of 31 & 32 Vict. c. 119, s. 16) was not incorporated into the later Act. "I am not aware," said Mellish, L.J., in *Cohen v. S. E. Ry.* (*o*), "that there is any such rule of construction of an Act of Parliament. If some absurdity or inconvenience followed from holding it to apply to the whole Act, it might be reasonable to confine the incorporation to clauses relating to some particular subject-matter, but if there is no inconvenience from holding that the incorporation includes section 7 as well as the other sections, we ought to hold that it does."

The learned Lord Justice no doubt meant by "clauses" what would now be called "sections," for it is usual to distinguish the term "clause" from the term "section" by using the former to denote the paragraph when in a Bill, the latter to denote it in an Act. But "clause" is often used for "section" in decisions on construction.

Construction of Provisoes.

9. The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso

(*m*) See ss. 8, 41, *post*, Appendix B.

(*n*) *Per* Holroyd, J., in *R. v. Newark-upon-Trent* (1824), 3 B. & C. 59, 71.

(*o*) (1877), 2 Ex. D. 253, 260.

cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect (*p*).

"When one finds a proviso to a section," said Lush, J., in *Mullins v. Treasurer of Surrey* (*q*), "the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."

In *West Derby Union v. Metropolitan Life Assurance Co.* (*r*) Lord Watson said: "I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light on the ambiguous import of the statutory words."

And Lord Herschell in the same case said (*s*): "I decline to read into any enactment words which are not to be found there and which would alter its operative effect because of provisions to be found in any proviso," though he admitted that a proviso may be a useful guide in the selection of one or other of two possible constructions of words in the enactment or to show the scope of the latter in a doubtful case.

In *R. v. Dibdin* (*t*), in considering the meaning of the proviso to section 1 of the Deceased Wife's Sister's Marriage Act, 1907, which afforded immunity to clergy from an act or omission in the duties of their office, Moulton, L.J., said: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as, for instance, in *Ex p. Partington* (*u*), *Re Brocklebank* (*x*), and *Hill v. East and West India Dock Co.* (*y*),

(*p*) See *Duncan v. Dixon* (1890), 44 Ch. D. 211, 215, Kekewich, J.; *Toronto Corp. v. Att.-Gen. of Canada*, [1946] A. C. 32, 37, Lord Macmillan.

(*q*) (1880), 5 Q. B. D. 170, 173.

(*r*) [1897] A. C. 647, 652.

(*s*) *Ibid.* 655.

(*t*) [1910] P. 57, 125.

(*u*) (1844), 6 Q. B. 649, 653, where Denman, C.J., said: "We are of opinion that this case does not fall within the proviso which must be construed with reference to the preceding parts of the clause to which it is appended." The proviso must be read "as subordinate to the main clauses of the Act," *per* Martin, B., in *Stourbridge Navigation Co. v. Earl of Dudley* (1860), 3 E. & E. 409 at p. 427, following *Dudley Canal Co. v. Grazebrook* (1830), 1 B. & Ad. 59.

(*x*) (1889), 23 Q. B. D. 461.

(*y*) (1884), 9 App. Cas. 448.

have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in the proviso."

So where section 65 in a group of sections from section 62 onwards in a private Act at the side of which was a note "Sewers—Sanitary arrangements," provided that "nothing in the Act shall authorise the Corporation of Newcastle-on-Tyne to commit a nuisance," and the Improvement Act of 1885 by section 22 authorised the corporation to erect posts, rails and fences for the protection of passengers and traffic, it was argued that this authority must be read subject to the proviso as to nuisance; but the Court held that the proviso affected only the group of sections to which it was attached and was not a proviso to section 22 (z). But sections, though framed as provisos upon preceding sections, may exceptionally contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before (a).

Proviso repealed by repeal of substantive enactment. "It is a well-known rule," said Bovill, C.J., in *Horsnail v. Bruce* (b), "in the construction of statutes, that if a substantive enactment is repealed, that which comes by way of proviso upon it is impliedly repealed also."

Construction of repugnant provisos and saving clauses. It sometimes happens that there is a repugnancy between the enacting clauses and the provisos and saving clauses. The question then arises, How is the Act, taken as a whole, to be construed? The generally accepted rule with regard to the construction of a proviso in an Act which is repugnant to the purview of the Act is that laid down in *Att.-Gen. v. Chelsea Waterworks* (c), namely, "that where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers" (d).

"Where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the section containing the qualification" (e).

But it has been usually laid down that this rule only holds good with regard to a proviso if repugnant, and that if the repugnant clause is in the form of a saving clause, then this rule holds good no longer,

(z) *Dormer v. Newcastle-on-Tyne Corporation*, [1940] 2 K. B. 204.

(a) *Rhondda U. D. C. v. Taff Vale Ry.*, [1909] A. C. 253, 258, a case on ss. 50, 51 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). In *Local Government Board v. South Stoneham Union*, [1909] A. C. 57, 63, the H. L. construed as a qualifying proviso words which the C. A. had treated as having been inserted by some blunder in the wrong place.

(b) (1873), L. R. 8 C. P. 378, 385.

(c) (1731), Fitzg. 195.

(d) See *Wood v. Riley* (1867), L. R. 3 C. P. 26, 27, Keating, J., *Jobbins v. Middlesex County Council*, [1949] 1 K. B. 142; Maxwell, 9th ed., p. 165.

(e) *Moss v. Elphick*, [1910] 1 K. B. 465, 468, Pickford, J., a case on ss. 26, 32 of the Partnership Act, 1890 (53 & 54 Vict. c. 39).

for it is said that a saving clause which is repugnant to the purview of the Act is to be rejected and treated as void. In the *Case of Alton Wood* (f) Lord Coke gives the following illustration of this: "If it be recited by an Act of Parliament that whereas J. S. is seised of certain land in fee, this land by the same Act is given to the king in fee, saving the estates, rights, etc., of all persons, the estate of J. S. is not saved thereby, for that would be repugnant and make the express grant void." It appears very doubtful whether this distinction between the effect of a saving clause and a proviso would now be upheld, the reason of the distinction being, as Kent says in his Commentaries (g), by no means apparent, and contrary, as he tells us, to the rules of American law. The same view has been taken in the Irish case of *Clelland v. Ker* (h), where it was held that a saving clause, if co-extensive with the enactment and therefore repugnant must give way to the enactment; and in the Scottish case of *Lord Advocate v. Hamilton* (i), where it is said by Lord Brougham that, as a general rule, a salvo cannot create any affirmative or positive right. "The true principle," say the editors of Kent's Commentaries, "undoubtedly is, that the sound interpretation and meaning of the statute on a view of the enacting clause, saving clause, and proviso, taken and construed together, are to prevail. If the principal object of the Act can be accomplished and stand under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy" (k). This, it is submitted, would be held by our English Courts at the present day to be good law (l).

Pleading proviso or saving clause. Former rule. There was another difference between the effect of a saving clause and a proviso, which no longer exists in practice. This is that, as Lord Abinger said in *Thibault v. Gibson* (m), "it is a well-established principle that in all cases where proceedings are taken for the recovery of a penalty under a statute if there is any *exception* in the clause which gives the penalty exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where the exception comes by way of *proviso* in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is a matter which the defendant must allege as a ground of defence."

Present rule. But this former rule of pleading is now abrogated as to civil proceedings by the Rules of the Supreme Court. Ord. XIX, r. 15, provides that "the defendant or plaintiff, as the case may

(f) (1600), 1 Co. Rep. 40b.

(g) 1 Kent Comm. (14th ed.), p. 462.

(h) (1843), 6 Ir. Eq. R. 35, affd. (1843), 6 Ir. Eq. R. 288.

(i) (1852), 1 Macq. H. L. (Sc.) 46, 52.

(k) 14th ed. by Holmes, vol. i, p. 463, note (b).

(l) But see the argument of Stephens, Q.C., in *Hebbert v. Purchas* (1870), L. R. 3 P. C. 605, 617; and *Riddle v. White* (1793), 1 Anstr. 281, 294, Macdonald, C.B.

(m) (1843), 12 M. & W. 94. Hawkins Pleas of the Crown, Bk. 2, Chap. 25, ss. 4, 113.

be, must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the previous pleadings . . ." (n). The need for setting out provisos, etc., has been abolished as to prosecutions before a Court of summary jurisdiction by section 39 of the Summary Jurisdiction Act, 1879, but remains to some extent as to indictable offences created by statute. In *R. v. James* (o) Lord Alverstone, C.J., after quoting from *Thibault v. Gibson* (supra p. 204) summed up the law as follows: "We think the substance of the authorities is this: that it is not necessary for the prosecution to negative a proviso even though the proviso is contained in the same section of the Act of Parliament creating the offence unless the proviso is in the nature of an exception which is incorporated directly or by reference into the enacting clause so that the enacting clause cannot be read without the qualification introduced by the exception."

Provisoes are often inserted "to allay fears." "A proviso is inserted to guard against the particular case of which a particular person is apprehensive, although the enactment was never intended to apply to his case or to any other similar case at all" (p).

General and specific enactments; construction if repugnant. Acts of Parliament sometimes contain general enactments relating to the whole subject-matter of the statute, and also specific and particular enactments relating to certain special matters; and if the general and specific enactments prove to be in any way repugnant to one another, the question will arise, Which is to control the other? In *Pretty v. Solly* (q) Romilly, M.R., stated as follows what he considered to be the rule of construction under such circumstances. "The general rules," said he, "which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." "For instance," said the same Judge in *De Winton v. Brecon* (r), "if there is an authority in an Act of Parliament to a

(n) As to implied savings in respect of other statutes, laws, or rights, see p. 323 post.

(o) [1902] 1 K. B. 540, 543; followed in *R. v. Audley*, [1907] 1 K. B. 383, and cases there collected and discussed. See Archbold, Cr. Pl. (31st ed.), 40, 330; Indictments Act, 1915, Sched. 1 r. 5.

(p) *West Derby Union v. Metropolitan Life Assurance Co.*, [1897] A. C. 647, 656 Lord Herschell. *Curtis v. Maloney* [1950], 2 A. E. R. 982, 986 (proviso in s. 15 of Bankruptcy and Deeds of Arrangement Act, 1913).

(q) (1859), 26 Beav. 606, 610.

(r) (1859), 28 L. J. Ch. 598, 604.

corporation to sell a particular piece of land, and there is also a general clause at the end that nothing in the Act contained shall authorise the corporation to sell any land that would not control the particular enactment, but the particular enactment would take effect notwithstanding that it was not clearly expressed and distinct and the insertion of the exception in the general clause would be supplied. If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the Act of Parliament.” So in *Churchill v. Crease* (s) the question was whether a payment made by a bankrupt before the issuing of the commission against him was protected by 6 Geo. 4, c. 16, s. 82, which enacted that “all payments really and *bona fide* made, or which hereafter shall be made, to any creditor by a bankrupt, before the issuing of the commission against him, shall be deemed valid.” It was argued that, as by section 136 the Act was not to come into force until the September then next (*i.e.*, September 1, 1825) and the payment in question was made before that date, the Act would not apply to that payment so as to protect it. The Court, however, held that the payment was protected. “I should have thought,” said Best, C.J., “that section 136 was conclusive if there had been no conflicting intention to be collected from the Act, but the rule is that where a general intention is expressed (as here, that the Act should not come into force until September), and the Act expresses also a particular intention incompatible with the general intention (as here, that all payments *bona fide* made—*i.e.*, *heretofore* made—shall be protected), the particular intention is to be considered in the nature of an exception.”

Where one Act is incorporated into another. Where the later of two Acts provides that the two are to be read together, every part of each Act must be construed as if the two Acts had been one, unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified the provisions of the earlier Act (t). So where two Acts are “to be read and construed together as one Act” a proviso that “nothing in this (later) Act shall exempt the Company from any liability for any nuisance done by them” (or words to that effect) has been held to mean, “nothing in the combined Acts” shall exempt them from such liability as to which the earlier Act was silent (u). This is well illustrated in a case where the defendant company was sued for nuisance caused by four of its mains. Two had been laid under powers conferred by a private Act of 1891 which said nothing about liability for nuisance: the two others were laid under the London Hydraulic Power Act, 1884, which rendered the defendants liable for nuisance. The Acts of 1871 and 1884 were to be read together and the consequence was that the immunity from

(s) (1828), 5 Bing. 177, 180.

(t) *Canada Southern Rail. Co. v. International Bridge Co.* (1883), 8 App. Cas. 723, 727, Lord Selborne, L.C.

(u) *Read v. Joannon* (1890), 25 Q. B. D. 300.

liability formerly enjoyed by the defendants in respect of their two older mains was taken away and the liability extended to all four mains (x). The Sale of Food (Weights and Measures) Act, 1926 is to be read as one with the Weights and Measures Acts, 1878 to 1926, and therefore the special defence provided by section 12 (5) of the Act of 1926 to a principal or employer charged with an offence against "this Act" is available to a principal or employer charged with an offence against the Weights and Measures Act, 1878 (y).

The effect of bringing into a later Act, by reference, sections of an earlier Act is to introduce the incorporated sections of the earlier Act into the later Act as if they had been enacted in it for the first time. Consequently, when an Act of 1855 incorporated sections of an earlier Act of 1840 those sections were read so as to take effect as if they had been passed in 1855, and Lord Esher, M.R., said: "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855." (z).

And the same rule applies if an Act which lays down a general rule upon a subject is incorporated into another Act which gives a particular rule on the same subject—that is to say, in this case also the particular rule will abrogate the general rule. "If the particular (the incorporating) Act," said Lord Westbury in *Ex p. St. Sepulchre's* (a), "gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule of the Lands Clauses Act." (the incorporated Act). Thus, in *London, Chatham and Dover Ry. v. Wandsworth B. W.* (b), it appeared that the Railways Clauses Consolidation Act, 1845, was to be treated as incorporated into the special Act of the defendant company, except in so far as its provisions were expressly varied by the special Act. The Railways Clauses Act contains provisions as to how railway companies may be proceeded against in case they allow any of their bridges to remain out of repair; but the special Act also contained provisions on this subject differing from those in the Railways Clauses Consolidation Act. It was held, in accordance with the rule above stated, that the special Act containing provisions on the subject was to be taken as expressly varying the provisions contained in the Railways Clauses Act. So in *Att.-Gen. v. Great*

(x) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

(y) *Hart v. Hudson Bros., Ltd.*, [1928] 2 K. B. 629; *Phillips v. Parnaby*, [1934] 2 K. B. 299.

(z) *Re Wood's Estate* (1886), 31 Ch. D. 607, 615; and see *Re Mills' Estate* (1887), 34 Ch. D. 186.

(a) (1864), 33 L. J. Ch. 372, 376, see further on this subject p. 331 *post*.

(b) (1873), L. R. 8 C. P. 185.

Eastern Ry. (c), where the company proposed to stop up certain streets and to cross a street by an arch, it was held that the general enactment in the Railways Clauses Consolidation Act, 1845, s. 13, which provided that "where it is intended to carry the railway on an arch as marked on the said plan, the same shall be made accordingly," was abrogated by the enactment in the company's special Act of 1864 (with which had been incorporated the Act of 1845), which enabled the company to "stop up all streets within the area hereinbefore described." It was admitted that upon the "said plan" the street in question which the company claimed to be entitled to stop up was not marked as to be closed, and it was therefore argued that the company were bound by their plan. "But," said Mellish, L.J., "looking at the recitals and the 8th section (of the private Act), it is difficult to say how plainer words could have been used for the purpose of showing that the company were entitled to stop up this street. . . . The real question to be decided in this case is this, Does the recital in the special Act amount to an express varying of the enactment in the general Act, which says that the arch is to be constructed as delineated on the plan? I am very clearly of opinion that it does."

Schedules.

10. To some Acts of Parliament schedules are attached (d). These may be merely forms or examples of the way in which an enactment is intended to be carried out or may contain provisions important in themselves. For instance, by section 39 of the Law of Property Act, 1925, for the purpose of effecting the transition from the law existing prior to the Law of Property Act, 1922, to the law enacted by that Act (as amended) the provisions set out in the first schedule to the Act of 1925 are to form practically an Act of Parliament in themselves. "A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part" (e), and if an enactment in a schedule contradicts an earlier clause it prevails against it.

Forms in schedules. As a general rule, "forms in schedules are inserted merely as examples, and are only to be followed implicitly so far as the circumstances of each case may admit" (f); consequently it may sometimes happen that there is a contradiction between the enactment and the form in the schedule. In such a case "it would be quite contrary to the recognised principles upon which Courts of law construe Acts of Parliament to . . . restrain the operation of an enactment by any reference to the words of a mere form given

(c) (1872), 7 Ch. App. 475, 481, 483.

(d) One of the earliest is that to the Isle of Man Purchase Act, 1765 (5 Geo. 3, c. 26).

(e) *Per Brett, L.J.*, in *Att.-Gen. v. Lamplough* (1878), 3 Ex. D. 214 229 (as to duty on articles named in the schedule to 52 Geo. 3 c. 150).

(f) *Per cur.* in *Bartlett v. Gibbs* (1843), 5 M. & G. 81, 96.

for convenience ' sake in a schedule " (g). This was well put by Lord Denman, C.J., in *R. v. Baines* (h). " It was argued," said he, " that the form of the *significavit* itself, as given in the schedule, proves that the Judge, *i.e.*, the bishop, is the only person who ought to certify, as ' by divine providence ' is a form that can only apply to a bishop. . . . Such form, although embodied in the Act, cannot be deemed conclusive of a question of this nature; we have also to consider the language of the section to which the schedule is appended, and if there be any contradiction between the two . . . upon ordinary principles, the form which is made to suit rather the generality of cases than all cases, must give way " (i).

But in some cases the form is imperative and must be strictly followed, *e.g.*, in the case of Bills of Sale Act (1878) Amendment Act, 1882 (k), and mortgages under section 31 of the Merchant Shipping Act, 1894 (l), and the form of ticket to be used by steerage passengers on certain steamships under section 320 of the last-mentioned Act (m) and a few others.

Illustrations.

11. It is unusual to append illustrations to British Acts of Parliament (n) but Indian and Colonial Acts are full of them. Thus section 32 of the Evidence Ordinance, 1893, of the Straits Settlements (which is in similar terms to the Indian Evidence Act, I of 1872), provides that certain statements of relevant facts made by a person who is dead are themselves relevant facts in certain cases, and to this section are appended illustrations. The Judicial Committee held that in the construction of such an Act it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and of value in the construction of the text. It would, they say, require a very special case to warrant their rejection on the ground of their assumed repugnancy with the sections themselves. It would be the very last resort of construction to make any such assumption. " The great usefulness of the illustrations, which have, though not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired " (o).

(g) *Per* Lord Penzance in *Dean v. Green* (1882), 8 P. D. 79, 89. *Shore v. Cunningham*, [1907] 2 Ir. R. 360.

(h) (1840), 12 A. & E. 210, 226.

(i) In construing a private Act it was held in Scotland that the schedule could not be construed to enlarge the Act: *Laird v. Clyde Navigation Trustees* (1879), 6 Rettie (Sc.), 785; and see *Gemmell v. Garland* (1886), 12 Ont. Rep. 139; referring to *Mountcashell (Earl) v. O'Neil (Viscount)* (1854), 5 H. L. C. 937.

(k) *Saunders v. White*, [1902] 1 K. B. 472. Cf. *Thomas v. Kelly* (1888), 13 App. Cas. 506, 520, Lord Macnaghten; *Wing v. Epsom U. D. C.*, [1904] 1 K. B. 798; *Burchell v. Thompson*, [1920] 2 K. B. 80.

(l) *Liverpool Borough Bank v. Turner* (1861), 30 L. J. Ch. 379.

(m) *Ryan v. Oceanic Steam Navigation Co.*, [1914] 3 K. B. 731.

(n) There are however elaborate illustrations in the University Elections (by Single Transferable Vote) Regulation, 1918 (S. R. & O. 1918 No. 1348), sched. I.

(o) *Mahomed Syedal Ariffin v. Yeoh Ooi Gark*, [1916] 2 A. C. 575, 581, Lord Shaw.

PART II

EFFECT AND OPERATION OF STATUTES

CHAPTER I

EFFECT OF STATUTES CREATING DUTIES (a)

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General liabilities for breach of statutory duty.

1. Very many statutes have been passed especially in recent years to create duties performable either by particular individuals indicated by the statute, or by any persons who bring themselves within the operation of the statute; and questions often arise as to what liability is incurred by neglect, omission, or refusal to perform these statutory duties (a).

The general principles of liability for injuries due to breaches of statutory duties are set out in *Lochgelly Iron, etc., Co. v. M'Mullan* (b); *Monk v. Warbey* (c); and *Caswell v. Powell Duffryn, etc., Co.* (d).

(a) See further on this subject and its relation to tort, Clerk and Lindsell, *Torts*, 10th ed. pp. 73-75, 944-961.

(b) [1934] A. C. 1.

(c) [1935] 1 K. B. 75.

(d) [1940] A. C. 152; Cf. also *Whitehead v. James Stott*, [1949] 1 K. B. 358. *Galashiels Gas Co. v. O'Donnell*, [1949] A. C. 275.

When a statute creates a duty, one of the first questions for judicial consideration is what is the sanction for its breach, or the mode for compelling the performance of the duty? This question usually resolves itself into the inquiry whether the Act is mandatory or directory, *i.e.*, absolute or discretionary. If it is directory the Courts cannot interfere to compel performance or punish breach of the duty, and disobedience to the Act does not entail any invalidity. If the Act is mandatory, disobedience entails legal consequences, which may take the shape of a public or private remedy obtainable in a Court of justice, or the avoidance of some contract, instrument, or document without the intervention of any Court.

"*Shall*" and "*may*." This distinction is reflected in the use of the words "*shall*" or "*may*" in a statute. The meaning of these words "*shall*" and "*may*" in a statute conferring a power is the subject of constant and conflicting interpretation (*e*). "'*May*' does not mean '*must*'; '*may*' always means '*may*.' '*May*' is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it" (*f*). The rule is laid down in *Julius v. Bishop of Oxford* (*g*), which arose on the meaning of the words "*it shall be lawful*" in section 3 of the Church Discipline Act, 1840. Lord Cairns states it in these terms: "The question has been argued, and has been spoken of by some learned Judges in the Courts below, as if the words '*it shall be lawful*' might have a different meaning and might be differently interpreted in different statutes or in different parts of the same statute. I cannot think that this is correct. The words '*it shall be lawful*' are not equivocal. They are plain and unambiguous. They confer a faculty or power, and they do not of themselves do more than convey a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide on an application for a *mandamus*."

Lord Blackburn thought that all the cases which held that a power of this kind must be used were to be supported on the principle that, although *prima facie* the donee of the power may either exercise it or leave it unused, yet "if the object for which a power is conferred

(*e*) See further on the meaning of the expressions "*may*" and "*it shall be lawful*," chap. ii, § 6, *post*.

(*f*) *Per* Talbot, J., in *Sheffield Corporation v. Luxford*, [1929] 2 K. B. 180 at p. 183. Cf. *Border R. D. C. v. Roberts*, [1950] 1 K. B. 716, 728, 729, *per* Somervell, L.J.

(*g*) (1880), 5 App. Cas. 214, 222, 241, 245.

is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. . . . The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

Remedies. Where, in a statute creating a duty, no special remedy is prescribed for compelling performance of the duty or punishing its neglect, the Courts will, as a general rule, presume that the appropriate common law remedy by indictment, mandamus, or action was intended to apply. "The general rule of law" (or rather of construction) "is that where a general obligation is created by statute and a specific statutory remedy is provided, that statutory remedy is the only remedy" (*h*). The scope and language of the statute and considerations of policy and convenience may, however, create an exception showing that the Legislature did not intend the remedy (*e.g.*, a penalty) to be exclusive (*i*).

Even where the statute creating the duty also provides a special remedy for its enforcement, the common law remedies (of indictment, information by the Attorney-General, mandamus, or action according to the subject-matter) are in many cases available cumulatively or alternatively to the special remedy contained in the statute. Whether they are so or not is upon each statute a question of construction.

(a) *Liability to indictment.* As a general rule, a person who neglects to perform a statutory duty or disobeys a statutory prohibition is guilty of misdemeanour, and is liable to be proceeded against by indictment if the duty is public (*k*), and it is no defence to contend that it is more for the public benefit to disobey than to obey the statute (*l*). Charles, J., in *R. v. Hall* (*m*), adopted, as the principle which should govern a case of this description, the rule stated in Hawkins' Pleas of the Crown, book 2, ch. 25, s. 4. The passage is as follows: "It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved,

(*h*) *Clegg Parkinson & Co. v. Earby Gas Co.*, [1896] 1 Q. B. 592, 595, Wright, J., who continued "That principle is laid down in *Doe v. Bridges* (1831), 1 B. & Ad. 847, 859 (Lord Tenterden); *Stevens v. Jeacocke* (1848), 11 Q. B. 731, 741 (Erle, J.); *Marshall v. Nicholls* (1852), 18 Q. B. 882, 888 (Lord Campbell, C.J.) and other cases." *Institute of Patent Agents v. Lockwood*, [1894] A. C. 347; *Saunders v. Holborn District Board of Works, etc.*, [1895] 1 Q. B. 64; *Barraclough v. Brown*, [1897] A. C. 615; *Stuckey v. Hooke*, [1906] 2 K. B. 20.

(*i*) *Waghorn v. Collison* (1922), 91 L. J. K. B. 735, 736, Bankes, L.J.; 738 Atkin, L.J.

(*k*) See *R. v. Tyler*, [1891] 2 Q. B. 588, 592, Bowen, L.J.; *Fox v. R.* (1859), 29 L. J. M. C. 54.

(*l*) *Att.-Gen. v. L. N. W. Ry.*, [1900] 1 Q. B. 78, 83, A. L. Smith, L.J. Cf. *Att.-Gen. v. G. E. Ry.* (1879), 11 Ch. D. 449.

(*m*) [1891] 1 Q. B. 747, 753. Most of the earlier cases are discussed in the judgment at pp. 762-769. *R. v. Hall* was followed in *Saunders v. Holborn D. B. W.*, [1895] 1 Q. B. 64, 69.

but also by way of indictment for his contempt of the statute, *unless such method of proceeding do manifestly appear to be excluded by it (n)*. Yet, if the party offending have been fined to the King in the action brought by the party, as it is said that he may in every action for doing things prohibited by statute, it seems questionable whether he may be afterwards indicted, because that would be to make him liable to a second fine for the same offence. Also where a statute makes a new offence which was in no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender, as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because the mentioning the other methods of proceeding seems impliedly to exclude that of indictment. Yet it hath been adjudged that if such statute give a recovery by action of debt, bill, plaint, or information, *or otherwise*, it authorises a proceeding by way of indictment. Also, where a statute adds a further penalty for an offence prohibited by the common law, there can be no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. And if the indictment for such offence conclude *contra formam statuti*, and cannot be made good as an indictment upon the statute, it seems to be now settled that it may be maintained as an indictment at common law."

The principle laid down in the latter part of this passage has been adopted by Parliament in section 33 of the Interpretation Act, 1889 (*o*), which provides that where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of the Acts or at common law, but is not liable to be punished twice for the same offence. This provision applies to all Acts, public, local, personal, and private. By the contrary intention seems to be meant some repugnancy between the two or more laws or express repeal of the prior law. "I always took it that where new created offences are only prohibited by the general prohibitory clause of an Act of Parliament, an indictment will lie; but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy" (*p*).

(*n*) In cases relating to the maintenance of highways, whether *ratione tenuræ* or at the public expense, the remedy of non-repair is by indictment, and no action for damages lies at the suit of an individual: *Cowley v. Newmarket Local Bd.*, [1891] A. C. 345; *Pictou Municipality v. Geldert*, [1893] A. C. 524; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433; *Craib v. Woolwich B.C.* (1920), 36 T. L. R. 630 (sewer, non-exercise of statutory powers, no action); *Hesketh v. Birmingham Corporation*, [1924] 1 K. B. 260, 271, Scrutton, L.J. (sewer). *Clark v. Epsom R. C.*, [1929] 1 Ch. 287 (drainage). (*o*) *Post*, Appendix B.

(*p*) *R. v. Wright* (1758), 1 Burr. 543, 544, Lord Mansfield, C.J. Cf. *R. v. Buchanan* (1846), 8 Q. B. 883. S. 33 of the Interpretation Act, 1889, does not affect this opinion. And see *R. v. Tyler*, [1891] 2 Q. B. 588, 592.

The fact that the penalty is annexed to the offence in the clause of the Act creating it, as a general rule excludes any remedy other than the special penalty for the mere breach of the duty created by the Act (*q*). But it is not essential for the application of this rule that the offence and penalty should be contained in the same clause. "All that the authorities establish is, that where there is a substantive general prohibition (or command) in one clause and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded" (*r*).

In *R. v. Buchanan* (*s*) it was held that an indictment lay against a person acting as an attorney without admission in defiance of the express prohibition of section 2 of the Solicitors Act, 1843, although section 35 of the Act provided a special mode of punishment.

In *Fox v. R.* (*t*) it was held that an indictment lay against a clerk to borough justices for being interested in the prosecution of offenders committed for trial by the borough justices, as he was not liable to the particular penalty specified in section 102 of the Municipal Corporations Act, 1835 (*u*).

Where breach of a statute involves liability to a specified penalty, and even in those cases in which indictment is, without express provision, the remedy for a breach of the statutory duty, it will not lie for the mere breach of the statutory command or prohibition. There must be some improper conduct—something constituting a *mens rea* (*x*).

(b) *Mandamus*. Whenever a corporation or person, whether filling an office under the Crown or not, has a statutory duty of a public nature towards another person, such as to do an act or to make an order (*y*), *mandamus* will lie to compel performance of the duty at the suit of any person aggrieved by the refusal to perform it, unless another remedy is clearly indicated by the statute (*z*). This rule does not apply to duties created by charter or royal warrant (*a*). "The writ . . . is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to any man nor to delay anybody in obtaining justice. If

(*q*) *Couch v. Steel* (1854), 3 E. & B. 402.

(*r*) *R. v. Hall*, [1891] 1 Q. B. 747, 770, Charles, J.

(*s*) (1846), 8 Q. B. 883.

(*t*) (1859), 29 L. J. M. C. 54 (Ex. Ch.).

(*u*) 5 & 6 Will. 4, c. 76, repealed by the Municipal Corporations Act, 1882.

(*x*) *Shopee v. Nathan*, [1892] 1 Q. B. 245, 252, Collins, J.; approved *Lee v. Dangar, Grant & Co.*, [1892] 2 Q. B. 337, 349, Lord Esher, M.R.; See *Bagge v. Whitehead*, [1892] 2 Q. B. 355; and see Part II, chap. ii., *post*.

(*y*) *R. v. Income Tax Commissioners* (1888), 21 Q. B. D. 313, 322. See *R. v. Commissioners of Woods and Forests* (1850), 15 Q. B. 761; *R. v. Leicester Union*, [1899] 2 Q. B. 632; *R. v. Board of Education*, [1910] 2 K. B. 165, 179, p. 13, *ante*; *R. v. Treasury*, [1909] 2 K. B. 183, 191; *R. v. Port of London Authority* (1918), 88 L. J. K. B. 553; *R. v. Tribunal of Appeal under the Housing Act*, 1919, [1920] 3 K. B. 334.

(*z*) *Pasmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387. See *Re Barlow* (1861), 30 L. J. Q. B. 271; *R. v. Lambourne Valley Ry.* (1888), 22 Q. B. D. 463; *Smith v. Chorley U. D. C.*, [1897] 1 Q. B. 532, and cases there cited; and see generally R. S. C., O. LIII.

(*a*) *R. v. Sec. State for War*, [1891] 2 Q. B. 326; *R. v. Treasury* (*supra*).

therefore, there is no other means of obtaining justice, the writ . . . is granted to enable justice to be done" (b). But where there is another remedy, equally convenient, speedy, beneficial and effectual, mandamus will not be granted. This is not a rule of law, but a rule regulating the discretion of the Court in granting mandamus; and unless the Court can see clearly that there is another remedy equally convenient, beneficial and effectual, mandamus will be granted provided the circumstances are such in other respects as to warrant the grant of the writ (c). By remedy is meant not a remedy by act of the party, but *remedium juris*, or "some specific legal remedy for a legal right" (d). Thus, in *R. v. Registrar of Joint Stock Companies* (e), an attempt was made to compel the registrar to file a contract under section 25 of the Companies Act, 1867 (f), which he had refused to file on the ground that it was insufficiently stamped, but the application was refused on the ground that another appropriate, convenient, and effectual remedy existed for questioning the legality of the refusal under sections 18—20 of the Stamp Act, 1870 (g). Consequently, when the statute creating the duty, or any other statute, contains a specific and adequate remedy for the breach, the remedy by mandamus is not available, it being not an ordinary alternative, but a last resort to the prerogative. Mandamus is also granted to compel the discharge by undertakers of duties imposed on them by special Acts (h). This is a way of keeping such persons to the terms of their Parliamentary bargains. Mandamus may issue even after the time for performance of the duty has expired, as the fixing of such times is merely directory (i). Mandamus is not granted at the suit of a private person where a particular procedure for obtaining redress is indicated by the statutes creating the duty (k). "The Court of Chancery never granted a mandamus (in a matter of Chancery jurisdiction) to a public body to compel it to do things for the benefit

(b) *Re Nathan* (1884), 12 Q. B. D. 461, 473, 478; *Stepney B. C. v. Walker (John) & Sons*, [1934] A. C. 365, 396, Lord Wright (statutes had provided their own exclusive machinery for their enforcement).

The prerogative writs of mandamus, prohibition and certiorari were abolished by the Administration of Justice Act, 1938 (1 & 2 Geo. 6, c. 63), s. 7 and an order of mandamus, an order of prohibition and an order of certiorari substituted therefor. The procedure is regulated by R. S. C. O. LIX. The change in the machinery does not alter the principles on which the remedies are granted.

The power of the court to grant relief by mandamus is not affected by the Crown Proceedings Act, 1947 (10 & 11 Geo. 6, c. 44), notwithstanding that by reason of the provisions of that Act some other and further remedy is available: *ibid.* s. 40 (5).

(c) *Re Barlow* (1861), 30 L. J. Q. B. 271; adopted in *R. v. Leicester Union*, [1899] 2 Q. B. 632, 639; *Stepney B. C. v. Walker (John) & Sons (supra)*.

(d) *R. v. Archbishop of Canterbury* (1812), 15 East 117, 136, Lord Ellenborough, C.J.; adopted in *R. v. Leicester Union, supra*, at p. 638.

(e) (1888), 21 Q. B. D. 131.

(f) Now represented by s. 52 of the Companies Act, 1948.

(g) Repealed, but re-enacted as ss. 12, 13 of the Stamp Act, 1891.

(h) *R. v. L. N. W. Ry.*, [1899] 1 Q. B. 921.

(i) *Stepney B. C. v. Walker (John) & Sons, supra*.

(k) *Pasmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387.

of a private person who might be benefited thereby" (l). But in *R. v. Leicester Union* (m) it was held that the Court ought to grant a mandamus at the instance of the Local Government Board to compel poor-law guardians to appoint a vaccination officer, though the Local Government Board could, on default of the guardians, have appointed such officer without resorting to the Courts. Mandamus has been granted to hold a valid election to a borough council, and to compel the production of accounts of an urban district council to a ratepayer, even though the officers of the council refusing could have been prosecuted (n). It is always necessary, on application for mandamus, to ascertain whether the Legislature has in the statute involved given a command to which it is the business of the Courts to enforce obedience, or simply a direction, discretion, or counsel of perfection, with which no judicial interference is permissible (o).

(c) *Equitable remedies*. The High Court of Justice, in the exercise of its equitable jurisdiction, will in some cases interfere by mandatory or other injunction to restrain the breach or compel the performance of a statutory duty. The rule as stated by Farwell, J., in *Stevens v. Chown* (p), is that "there was nothing to prevent the Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy, subject only to this, that the right was such a right as the Court under its original jurisdiction would take cognisance of" (q).

The willingness of the Court to intervene depends upon the nature of the duty to be performed, and, as a rule, the Court will confine the exercise of this jurisdiction to cases where there is a legal wrong done or threatened as distinct from a neglect to perform the statutory duties (r). But the jurisdiction is not limited to cases where an action at law could lie (s): and the mere fact that the duty is created by statute and does not arise from an ordinary contract, will make no difference. A public body, whether it be a municipal corporation or a

(l) James, L.J., in *Glossop v. Heston & Isleworth Local Board* (1879), 12 Ch. D. 102 at p. 115.

(m) [1899] 2 Q. B. 632.

(n) *Re Barnes Corporation*, [1933] 1 K. B. 668; *R. v. Bedwellty U. D. C.*, [1934] 1 K. B. 333.

(o) *Re Northam* (1884), 12 Q. B. D. 461, 478; *R. v. Bank of England* (1780), 2 Doug. 524; *R. v. Shoreditch Assessment Committee* (1910), 26 T. L. R. 663; *R. v. City of London Assessment Committee*, [1907] 2 K. B. 764; *Stepney B. C. v. Walker (John) & Sons, Ltd.*, [1934] A. C. 365.

(p) [1901] 1 Ch. 894, 904. *Att.-Gen. v. Sharp*, [1931] 1 Ch. 121 (C. A.). (Rights of public involved and remedies provided by Act proved ineffective).

(q) In *Att.-Gen. v. Churchill's Veterinary Sanatorium, Ltd.*, [1910] 2 Ch. 401, a company, though not liable as a person to the penalties of the Veterinary Surgeons Act, 1881, was restrained from holding out itself or its employees as qualified to practise veterinary surgery.

(r) *Glossop v. Heston L. B.* (1879), 12 Ch. D. 102, 116.

(s) *Emperor of Austria v. Day* (1861), 3 De G. F. & J. 217, 253; *Stevens v. Chown*, *supra*.

trading company (t), which has statutory powers and is proceeding to exceed its statutory powers or to infringe or disregard express terms introduced into the statute in the interests of the public as a condition of the exercise of the powers, may be restrained by injunction at the suit of the Attorney-General in the absence of any other specific or exclusive remedy; and in certain cases the Attorney-General has been held entitled to intervene to prevent infringement of local by-laws as to new streets or regulations as to the building line (u).

The equitable jurisdiction has also in some instances been exercised *ad interim* to prevent irremediable mischief pending the determination of the chief matter in question, even when there is no question to be tried in the High Court, and the matter in dispute is to be determined by some special statutory tribunal to the exclusion of the ordinary Courts (x). And where municipal corporations or other public bodies are about to apply public moneys for unauthorised purposes in excess of their statutory powers, there is undoubtedly jurisdiction to interfere by injunction at the suit of the Attorney-General, since in such a case *certiorari* is not an adequate remedy (y).

This course was adopted in *Tynemouth Corporation v. Att.-Gen.* (z) to prevent expenditure of money in opposing the renewal of licences to sell liquor; and in *London County Council v. Att.-Gen.* (a), *Att.-Gen. v. Manchester Corporation* (b), *Att.-Gen. v. Mersey Ry.* (c), and *Att.-Gen. v. Leicester Corporation* (d), to prevent the unauthorised running of omnibuses and carriage of parcels as aids or adjuncts to an authorised municipal tramway service, or an authorised railway service, and the supply of electric fittings by a municipal corporation authorised to supply electricity.

In the case of statutory commercial companies it is said that the business of the Courts is to "keep the undertakers within their Acts" (e). In the case of public bodies the rights of the ratepayers are primarily affected. It is not necessary to prove that the contravention of the statute has been or will be attended by any public inconvenience. Nor is it an answer to show that the act done is also a misdemeanour or an offence punishable on summary conviction (f).

(t) *Ashbury Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653; *Att.-Gen. v. G. E. Ry.* (1880), 5 App. Cas. 473; *London County Council v. Att.-Gen.*, [1902] A. C. 165; *Att.-Gen. v. Manchester Corporation*, [1906] 1 Ch. 643; *Att.-Gen. v. Mersey Ry.*, [1907] A. C. 415; *Att.-Gen. v. N. E. Ry.*, [1915] 1 Ch. 905; *Att.-Gen. v. Fulham Corp.*, [1921] 1 Ch. 440.

(u) *Att.-Gen. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, 107, Buckley J.; *Att.-Gen. v. Hatch*, [1893] 3 Ch. 36; *Att.-Gen. v. Rufford*, [1899] 1 Ch. 537; cf. *Devonport Corporation v. Tozer*, [1902] 2 Ch. 182; [1903] 1 Ch. 759.

(x) *Hayward v. E. London W. W. Co.* (1884), 28 Ch. D. 138; *Stevens v. Chown*, [1901] 1 Ch. 894, 907.

(y) *Att.-Gen. v. Merthyr Tydfil Union*, [1900] 1 Ch. 550.

(z) [1899] A. C. 293.

(b) [1906] 1 Ch. 643.

(d) [1910] 2 Ch. 359.

(e) *Goldie v. Oswald* (1814), 2 Dow (H. L.) 534; *Burnet v. Knowles* (1815), 3 Dow (H. L.) 280.

(f) *Att.-Gen. v. L. N. W. Ry.*, [1900] 1 Q. B. 78, and cases there cited; *Att.-Gen. v. Ashborne Recreation Ground Co.*, *supra*.

(a) [1902] A. C. 165.

(c) [1907] A. C. 415.

Injunctions are often granted against local authorities at the suit of private persons in respect of their acts and defaults in carrying out statutory duties (g), but, as a rule, the proper remedy is by mandamus or action for an injunction by the Attorney-General (h), instead of the private remedy (i). It is always necessary to see whether the statutes creating the duty prescribe a particular remedy for failure to perform it (k). Even if satisfied that the public body is offending against a statute, an injunction is not granted as a matter of course at the suit of the Attorney-General (l), and the remedy is discretionary (m).

In cases where notice of action is necessary to entitle an individual to damages for neglect by a corporation of a statutory duty, he may be able, by an application for an injunction in a proper case, to get rid of the necessity of giving the notice, both shaking off the statutory fetter and seeking a remedy not specified in the statute (n).

(d) *Action lies for breach of statutory duty.* In *Wolverhampton New Waterworks Co. v. Hawkesford* (o) Willes, J., said: "There are three classes of cases in which liability may be established by statute. 1. There is that class where there is a liability existing at common law which is only remedied by the statute with a special form of remedy: thus, unless the statute contains words expressly excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. 2. Then there is a second class, which consists of those cases in which a statute has created a liability but has given no special remedy for it: thus the party may adopt an action of debt or other remedy at common law to enforce it (p). 3. The

(g) *Att.-Gen. v. Merthyr Tydfil Union*, [1900] 1 Ch. 550.

(h) R. S. C., Ord. I, r. 1.

(i) See *Glossop v. Heston L. B.* (1879), 12 Ch. D. 102, 115; *Att.-Gen. v. L. N. W. Ry.*, *supra.*; *Devonport Corporation v. Tozer*, [1903] 1 Ch. 759, 764; *Att.-Gen. v. Pontypridd W. W. Co.*, [1908] 1 Ch. 388, 398, but see *Att.-Gen. v. North Eastern Ry.*, [1915] 1 Ch. 905, 914, 917.

(k) *Pasmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387; *Clark v. Epsom R. D. C.*, [1929] 1 Ch. 287.

(l) *Att.-Gen. v. Birmingham, Tame and Rea District Drainage Board*, [1910] 1 Ch. 48; *Att.-Gen. v. Grand Junction Canal Co.*, [1909] 2 Ch. 505, 508. In the latter case an injunction was refused in an action for taking more water from a river than was allowed under a special Act of 1810, and for allowing works to be so constructed as not to comply with the Act. Joyce, J., took the view that the defendants had by prescription acquired rights as against private persons, and that the public interest did not require the injunction.

(m) *Att.-Gen. v. L. & N. W. Ry.* *supra.*, 87, Vaughan Williams, L.J.; *Att.-Gen. v. Wimbledon House Estate Co. Ltd.*, [1904] 2 Ch. 34, 42, Farwell, J.; *Att.-Gen. v. Birmingham, Tame and Rea District Drainage Board* (*supra.*), 53, Cozens-Hardy M.R., *affd.*, [1912] A. C. 788.

(n) *Chapman v. Auckland Union (Guardians of)* (1889), 23 Q. B. D. 294, 303; (damages in lieu of injunction); *Rendall v. Blair* (1890), 45 Ch. D. 139, 157. See p. 97 *ante*; *Johnston v. Consumers' Gas Co. of Toronto*, [1898] A. C. 447, 459, Lord Macnaghten; *Bathurst Borough v. Macpherson* (1879), 4 App. Cas. 256, 268.

(o) (1859), 6 C. B. (N.S.) 336, 356.

(p) In such a case the common law will, in general give a remedy suited to the particular nature of the case: *Doe d. Bishop of Rochester v. Bridges* (1831), 1 B. & Ad. 847, 859, Lord Tenterden, C.J.; adopted in *Pasmore v. Oswaldtwistle U. D. C.*, *supra.*; and see *Devonport Corporation v. Plymouth, etc., Tramways Co.* (1884) 52 L. T. 161, 164.

third class is where a statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. . . . With respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

Thus in *Cutler v. Wandsworth Stadium* (q) a bookmaker on a dog-racing track brought an action alleging that he had suffered damage in that the occupier had failed to make "available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track," under the Betting and Lotteries Act, 1934, section 11 (2). The Court of Appeal held that the question whether an individual who has suffered damage through breach of a statutory duty is entitled to maintain an action must in the last resort depend on the true construction of the statute. Where the statute does not in terms confer such a right—the only case in which this question can arise—the question of construction whether a right ought to be implied which *ex hypothesi* is not expressed, must be answered by a consideration of the whole statute and such other matters as may legitimately be considered in relation to its interpretation. The whole scope of the Act of 1934 is to provide the public and not the bookmakers with its requirements for the purposes of betting either with the totalisator or bookmakers. It is no object of the Act to confer on individual bookmakers a privilege in furtherance of their business which they never possessed before; consequently no action was maintainable. The House of Lords affirming the Court of Appeal added that as penalties were provided by section 30 (1) of the Act of 1934, it was to be inferred that the duty under section 11 (2) was not intended to have the additional sanction of civil liability.

The question whether an individual who is one of a class for whose benefit such an obligation is imposed can or cannot enforce performance by an action must depend, to use Lord Cairn's words in *Atkinson v. Newcastle Waterworks Co.* (r), "on the purview of the Legislature in the particular statute, and upon the language which they have there employed." It is especially so when the Act in question is not an Act of public or general policy, but is rather in the nature of a private legislative bargain with a body of undertakers, incorporated for purposes which Parliament considers of public or general utility (s). The Statute of Westminster the Second (13 Edw. 1), c. 50, gave a remedy by action on the case to all who are aggrieved by the neglect

(q) (1948) 64 T. L. R. 41, [1949] A. C. 398; *Doe v. Bridges* (1831), 1 B. & Ad. 847, 859, Lord Tenterden, C.J., and *Black v. Fife Coal Co.*, [1912] A. C. 149, were referred to; *Phillips v. Britannia Hygienic Laundry*, [1923] 2 K. B. 832; *Badham v. Lambs Ltd.*, [1946] K. B. 45; *Clarke v. Brims*, [1947] K. B. 497.

(r) (1887), 2 Ex. D. 441, 448. See also *Watkins v. Naval Colliery* (1897), *Ltd.*, [1912] A. C. 693; *Witham Outfall Board v. Boston Corporation* (1926), 136 L. T. 756, (1927), 138 L. T. 382, H. L.

(s) *Att.-Gen. v. Teddington U. D. C.*, [1898] 1 Ch. 66; *Att.-Gen. v. Swansea Corporation*, [1898] 1 Ch. 602; *Tynemouth Corporation v. Att.-Gen.*, [1899] A. C. 293.

of any duty created by statute, and it is laid down in Comyns' Digest (tit. "Action upon Statute," F.), "that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Upon these authorities it was stated in *Couch v. Steel* (t), as a broad general proposition, that wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed. But this proposition was doubted by the Court of Appeal in *Atkinson v. Newcastle Waterworks Co.* (u). In the latter case the defendants by their private Act had undertaken to keep the pipes to which fire-plugs were fixed charged with water at a certain constant pressure. In consequence of their neglecting to do this, a fire which had broken out upon the premises of the plaintiff could not be extinguished, and the premises were burnt down. Section 43 of the Waterworks Clauses Act, 1847, which was incorporated with the private Act of the defendants, provided that for neglecting to keep the fire-plugs properly charged with water the defendants should be liable to a penalty, part of which was to go to the person aggrieved by the neglect. "It was no part of the scheme of this Act," said Lord Cairns, "to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action, but its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and in certain cases to give penalties, or some of them, to the persons injured." Consequently it was held that this particular Act did not by implication give to persons who had suffered damage by the breach of the duties thereby imposed, any remedy over and above those which it gave in express terms, and that such a person could not maintain an action for damages.

Misfeasance and nonfeasance. Injury may be caused either by the fulfilment of the duty cast by the statute or by failure to carry it out (nonfeasance) or by negligence in its performance (misfeasance). As an instance of the former, *Vaughan v. Taff Vale Ry.* (x) may be quoted. No action lay against the company for a fire caused by sparks from their engines, which would have constituted an actionable nuisance at common law. There are also many instances of similar statutory protection afforded to public utility and railway companies in respect of other incidental nuisances such as noise and vibration (y).

(t) (1854), 3 E. & B. 402, 415, *per* Lord Campbell, C.J.

(u) (1877), 2 Ex. D. 441, 446, 448, approved on this point in *Cowley v. Newmarket Local Board*, [1892] A. C. 345. *Johnston v. Consumers Gas Co.*, Toronto, [1898] A. C. 447, 459; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832, 841; *Clarke v. Brims*, [1947] K. B. 497.

(x) (1860), 5 H. & N. 679.

(y) *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186.

Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (z) said: "It is now thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised if it be done negligently." More recently in *East Suffolk Rivers Catchment Board v. Kent* (a), Lord Atkin, after referring to *Mersey Docks & Harbour Board v. Gibbs* (d) and *Geddis v. Proprietors of Bann Reservoir* (supra), said: "I treat it therefore as established that a public authority whether doing an act which it is its duty to do or doing an act which it is merely empowered to do, must in doing that act do it without negligence, or as it is put in some of the cases must not do it carelessly or improperly." For failure to perform a duty or failure to perform it in a proper manner in the case of public bodies a distinction is drawn between nonfeasance and misfeasance (see above), and it is said that while no action will lie for not doing the duty, an action will lie for particular injuries occasioned by misfeasance. It has already been stated (ante, p. 214, note (n)) as a well-established rule that no action by the individual lies for damage which he has suffered by non-repair of a highway, and as a general rule the remedy in case of nonfeasance of a public duty is by indictment or mandamus (b), unless the duty is clearly to the individual and the nonfeasance is due to negligence (c); misfeasance is in substance equivalent to negligence in the execution of the statutory duty.

The proper canon of construction "is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of statute, shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose on a private person doing the same thing" (d).

It is often difficult to draw the line between misfeasance and nonfeasance, and the question of action or no action must often be answered by reference to the particular wording of the statute involved (e).

(z) (1878), 3 App. Cas. 430, 455, quoted *Longhurst v. Metropolitan Water Board* (1948), 64 T. L. R. 579, 581, Lord Porter. Contrast *Bank View Mill, Ltd. v. Nelson Corp.*, [1943] K. B. 337.

(a) [1941] A. C. 74, 90.

(b) *Smith v. Chorley U. D. C.*, [1897] 1 Q. B. 532.

(c) *Gibraltar Sanitary Commissioners v. Orfila* (1890), 15 App. Cas. 400; *Geddis v. Proprietors of Bann Reservoir* (supra).

(d) *Mersey Docks and Harbour Board v. Gibbs* (1866), L. R. 1 H. L. 93, 110, Blackburn, J.; cf., *The Bearn*, [1906] P. 48, 62, Deane, J., a case as to alleged defaults by a statutory harbour authority. See *Tozeland v. West Ham Union*, [1907] 1 K. B. 720, an action against a poor law corporation by a pauper for injuries suffered by him at work to which he was set. For the difference between an action for breach of statutory duty and negligence, cf. Lord Wright in *Caswell v. Powell Duffryn Colliery Co.*, [1940] A. C. 168, 177. Clerk & Lindsell, Torts, 10th ed. pp. 945 *et seq.*

(e) The following authorities may be consulted on this point: *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102; *Thompson v. Brighton Corporation*, [1894] 1 Q. B. 332; *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256; *Lambert v. Lowestoft Corporation*, [1901] 1 Q. B. 590; *McLelland v. Manchester Corporation*, [1912] 1 K. B. 118; *Thompson v. Bradford Corporation*, [1915] 1 K. B.

Ministerial and judicial duties. In deciding whether an action will lie for the breach of a duty imposed by statute, it is necessary to consider whether the duty is merely a ministerial one, or is of a discretionary or quasi-judicial nature. It is clear that an action will lie for the neglect of a duty of the former kind, but the question often arises as to which class a duty belongs. Thus, in *Schinotti v. Bumsted* (f) it was held that a commissioner of a lottery was a mere ministerial officer, and that, consequently, an action would lie against him for not adjudging the lottery prize to the person entitled to receive it. Similarly, in *Barry v. Arnaud* (g), a collector of customs was held to be a public officer whose functions were ministerial, and that he was therefore liable in an action for nonfeasance in the exercise of his duty. On the other hand, if the duty to be performed is judicial or even quasi-judicial, it is clear that no action will lie for the breach of it, unless the breach is shown to be wilful and malicious. Thus, in *Tozer v. Child* (h), it appeared that the defendants, who were acting as returning officers, had refused to receive the plaintiff's vote for four candidates for the office of vestrymen. "The defendants," said Creswell, J., "may not be Judges but they are quasi-Judges. They had to exercise an opinion upon the matter whether the plaintiff was entitled to vote or not. Having decided against the plaintiff, without malice or any improper motive, it would be monstrous to subject them to an action" (i). In *Board of Education v. Rice* (k), the salaries of teachers in non-provided schools were in question: these were to be determined by the Board which it was held had failed to deal with the matter in issue. Provided the questions are fairly treated and decided on the facts obtained, there was no appeal from the Board's decision. The Board had however no jurisdiction to determine abstract questions of law but only actual concrete differences as they arose between the school managers and the local education authority. "The Board is in the nature of an arbitral tribunal and a Court has no jurisdiction to hear appeals from their determination either upon law or fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described or have not decided the question which they are required by the Act to decide, then there is a remedy by mandamus and certiorari."

In order to found an action based on a breach of statutory duty

13; *Foreman v. Mayor, etc. of Canterbury* (1871) L. R. 6 Q. B. 214; *Maguire v. Liverpool Corporation*, [1905] 1 K. B. 767; *Whyler v. Bingham R. D. C.*, [1901] 1 K. B. 45; *Earl of Harrington v. Derby Corporation*, [1905] 1 Ch. 205; *Bull v. Shoreditch Corporation* (1902), 67 J. P. 37; *Hesketh v. Birmingham Corporation*, [1924] 1 K. B. 260, and *Robinson on Public Authorities*, 1925, pp. 183-197.

(f) (1796), 6 T. R. 646.

(g) (1839), 10 A. & E. 646.

(h) (1857), 26 L. J. Q. B. 151, 153.

(i) See also *Partridge v. General Medical Council* (1890), 25 Q. B. D. 90; *Allcroft v. London (Bishop)*, [1891] A. C. 666, 679. *Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431; *Marron v. Cootehill No. 2 R. D. C.*, [1915] A. C. 792.

(k) [1911] A. C. 179, 182. *Lord Loreburn, L.C.*, cf. *R. v. Paddington & St. Marylebone Rent Tribunal* (1949), 65 T. L. R. 200, 204.

it is necessary to ascertain that (a) the injury suffered was that contemplated by the statute; (b) that the person injured was within the ambit of the statute, and (c) that the damage was within the contemplated injury.

(i) *Damage sustained must be such as statute was intended to prevent.* If it appears from the language of the enactment that it is the intention of the Legislature that an action should lie for damage sustained by reason of neglect to perform some duty created by the statute in question, it will be necessary to prove that the damage or loss was of such a character as it was the direct object of the statute to prevent. Thus, in *Gorris v. Scott* (l), an action was brought by an owner of sheep against a shipowner who had undertaken to carry the plaintiff's sheep from a foreign port to England, because the defendant had neglected to do certain things enjoined by a Privy Council Order made under the authority of the Contagious Diseases (Animals) Act, 1869, s. 75 (m), in consequence of which neglect some of the sheep were washed overboard. It appeared that the object of the Act was solely to prevent the spread of disease among animals, and not to protect them against the perils of the sea; consequently, the Court held that no action could be maintained. "The Act," said Pollock, B., "was passed *alio intuitu* . . . the precautions directed may be useful and advantageous for preventing animals from being washed overboard, but they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action." So, in *Buxton v. North-Eastern Ry.* (n), it appeared that in consequence of the neglect of the railway company to maintain their fence in accordance with the provisions of section 68 of the Railways Clauses Consolidation Act, 1845, a bullock got on to the line and caused an accident in which the plaintiff, a passenger, sustained damage; but it was held that he had no right of action on account of this neglect on the part of the defendants to perform their statutory duty, because the statutory obligation was created solely with regard to, and for the benefit of, the owners and occupiers of the adjoining lands, and therefore that "the obligation, as to their passengers, to fence, is not imposed upon the company by that enactment." This case was followed very recently by the Court of Appeal (o), where a motorist struck a level crossing gate which was not securely fastened. The gate swung back across the line and was struck by an approaching train, the driver of which was injured. He sued the plaintiff for damages and the action was settled, the plaintiff paying the driver £400. The plaintiff then sued the Railway Executive for breach of their statutory

(l) (1874), L. R. 9 Ex. 125, 131. Cf. *ibid. per Kelly, C.B.*, at p. 128; explained in *Knapp v. Railway Executive* (*infra*), by Singleton, L.J., at p. 513, and by Jenkins, L.J., at p. 516.

(m) Repealed, and now represented by the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57).

(n) (1868), L. R. 3 Q. B. 549, 553, Blackburn, J.; *Brackenborough v. Spalding U. D. C.*, [1942] A. C. 310.

(o) *Knapp v. Railway Executive*, [1949] 2 A. E. R. 508.

duty (under s. 274 of the Brighton and Chichester Railway Act, 1844) for failure to keep the gate properly closed. The action was for an indemnity or a contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The Court held that the plaintiff was entitled to neither. The object of the Act of 1844 was to protect road users from dangers from the railway: therefore the benefit of an action could not be claimed by a driver employed by the railway; as driver he had no right of action. The plaintiff had therefore also no right of action under the Act of 1935.

(ii) *Person injured must be within ambit of statute.* The person injured must be within the ambit of the statute (see *ante*, p. 220), which is generally passed in favour of a limited class, e.g., employees. In *Johnston v. Consumers' Gas Co. of Toronto* (p) it was held that the special Act constituting the company did not give a cause of action to consumers complaining of overcharge, and that the sole remedy lay in the statutory right of the municipality of Toronto to investigate and check the accounts of the gas company, and in the event of disobedience by the company to the statute to take action against them on behalf of the public. Or there may be no question as to the plaintiff forming one of the public affected but he may have no separate right of action as stated by Wills, J., in *Clegg, Parkinson & Co. v. Earby Gas Co.* (q), where it was held that no private action lay under the Gasworks Clauses Act, 1871, for damages for failure to supply gas sufficient to satisfy the Act. The only remedy was for the penalties under section 36 of the Act. The learned Judge was of opinion that the action failed "on a principle deeper than that on which" *Atkinson v. Newcastle Waterworks* (r), and *Milnes v. Mayor of Huddersfield* (s) were decided, that is that: "Where there is an obligation created by statute to do something for the benefit of the public generally, or of such a large body of persons that they can only be dealt with practically *en masse*, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, although not necessarily in the same degree, there is no separate right of action to every person injured by breach of the obligation in no other manner than the rest of the public."

But shipowners may be liable under the Shipbuilding Regulations to an employee of ship repairers for failing to keep adequate lighting (t) and failure to fence a machine may involve liability to an operative not working on that particular machine (u).

In *Holborn Union v. Vestry of Shoreditch* (x) the defendants were held liable in damages to the plaintiffs for their refusal to perform

(p) [1898] A. C. 447.

(q) [1896] 1 Q. B. 592, 594. *Stevens v. Aldershot Gas Co.* (1933), 102 L. J. K. B. 12.

(r) (1877), 2 Ex. D. 441.

(s) (1886), 11 App. Cas. 511.

(t) *Wilkinson v. Rea*, [1941] 1 K. B. 688.

(u) *Harrison v. Metropolitan Plywood Co.*, [1946] K. B. 255.

(x) (1876), 2 Q. B. D. 145.

their statutory duty of removing house refuse from the plaintiffs' workhouse.

(iii) *Type of injury must be contemplated by statute.* The type of damage must be within the injury contemplated by the statute as in *Gorris v. Scott* (*ante*, p. 224) and *Vallance v. Falle* (y) where a seaman was unable to recover from his captain who had withheld his discharge certificate in breach of the Merchant Shipping Act, 1854. The penalty under the Act was exclusive.

How far negligence inferred from breach of statute. In order to succeed in an action for injuries consequent on disobedience to a statute it has in some cases been held necessary to prove more than the mere breach of the statute. By section 22 of the Railways Regulation Act, 1868, it is enacted that "every railway company shall provide in every train which carries passengers and travels more than twenty miles without stopping" a means of communication between the passengers and the guard. In *Blamires v. L. & Y. Ry.* (z), the plaintiff sued the company for injuries received in a railway accident, which (as he alleged) arose from the negligence of the company, and in proof of the charge of negligence, evidence was given that the company had not complied with the provisions of the Act as to supplying a communication between the passengers and the guard. Kelly, C.B., told the jury that "it is not every disobedience to an Act of Parliament that will constitute negligence . . . it is only if the duty (a) imposed by the Act be such that the neglect of it was likely to conduce to an accident such as that which had occurred." This ruling was upheld by the Exchequer Chamber, and in giving his judgment, Brett, J., said as follows: "It is right to use the Act as some evidence of what is due and ordinary care under the circumstances of the case, and that is the way the Chief Baron directed the jury to use it" (b). But in *Groves v. Lord Wimborne* (c), where the duty left unperformed was to fence dangerous machinery in a factory, it was held by the Court of Appeal that on failure to perform an absolute statutory duty followed by injury an action lay without alleging or proving negligence (d).

(y) (1884), 13 Q. B. D. 109.

(z) (1873), L. R. 8 Ex. 283, 286. Cf. *Hammond v. Vestry of St. Pancras* (1874), L. R. 9 C. P. 316.

(a) Where an Act merely empowers a railway company to do something which it is within their discretion whether they do or not, the non-performance of this may not be used as evidence of negligence: *Cliff v. Midland Ry.* (1870), L. R. 5 Q. B. 258. A defence good as against a statutory breach of duty may be invalid in an action based on negligence of a subordinate; *Gallagher v. Dorman Long & Co.*, [1947] 2 A. E. R. 38. See Beven: *Negligence* (4th ed.) 137.

(b) (1873), L. R. 8 Ex. at p. 289. Distinguished in *Gorris v. Scott*, p. 224 *ante*; followed in *Baddeley v. Earl Granville* (1887), 19 Q. B. D. 423; cf. also *Phillips v. Britannia Hygienic Laundry Co., Ltd.*, [1923] 1 K. B. 539; [1923] 2 K. B. 832, where the mere breach of reg. 6 of the Motor Car Order, 1904, which provides that motor cars and fittings shall be in a safe condition, was held not to afford a cause of action.

(c) [1898] 2 Q. B. 402.

(d) See also *Lochgelly Iron & Coal Co. v. McMullan*, [1934] A. C. 1, at pp. 13, 27. "Statute is itself conclusive evidence of negligence unless it contains some qualification," Lord Wright at p. 27; *Caswell v. Powell Duffryn, etc., Co.*, [1940] A. C. 152.

It now seems established by the authorities cited below that "if the plaintiff can show that there has been a breach of the statute he has established the existence of negligence. It remains for him to prove that the accident was due to that negligence" (e), although in a recent case *Scott, L.J.*, pronouncing the judgment of the Court said: "If there is a definite breach of a safety provision imposed on the occupier of a factory and a workman is injured in a way which could result from the breach, the onus shifts on to the employer to show that the breach was not the cause—we think that the principle lies at the basis of statutory rules of absolute duty" (f). And in *Brittanic Merthyr Coal Co. v. David* (g) it was held that the defendants were without proof of negligence civilly liable for breach of duties imposed on them by the Coal Mines Regulation Acts with regard to the use of explosives.

Reasonable care as good defence if duty not absolute. If the duty imposed by the Legislature upon a public body is not absolute, as a general rule, if they exercise due and reasonable care as to the performance of the duty, they will not be held liable if for some reason or other it becomes impossible for them to discharge the duty. As *Cockburn, C.J.*, said in *Re Bristol, etc., Ry.* (h), "it would be contrary to the elementary principles of justice to enforce by mandamus [a statutory] order which imposes a duty which it is impossible to discharge." In *Hammond v. Vestry of St. Pancras* (i), the vestry of St. Pancras had the duty cast upon them by section 72 of the Metropolis Management Act, 1855, of properly cleaning the sewers vested in them by the Act. The Court held that this was not an absolute duty, for breach of which causing damage an action would lie without proof of negligence. "It would seem to me," said *Brett, L.J.*, "to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty, notwithstanding, may be absolute, but if so, it ought to be imposed in the clearest possible terms."

Lord Atkin in *Smith v. Cammell Laird* (k), referring to the duty imposed by the Regulations made under section 79 of the Factory and Workshop Act, 1901, said: "The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well known feature of this class of legislation. It is to be found in such Acts as the Coal Mines Acts and in the Factory Acts themselves."

Act of God as defence. As a general rule, if a duty is cast

(e) *Caswell v. Powell Duffryn, etc., Co.* (supra), at p. 168, *Lord Macmillan*.

(f) *Vyner v. Waldenberg Bros.*, [1945] 2 A. E. R. 547, 549.

(g) [1910] A. C. 74.

(h) (1877), 3 Q. B. D. 10, 13.

(i) (1874), L. R. 9 C. P. 316, 322. See also *Richmond Gas Co. v. Richmond Corporation*, [1893] 1 Q. B. 56; *Blundy, Clark & Co. v. L. & N. E. Ry.*, [1931] 2 K. B. 334.

(k) [1940] A. C. 242, 258; *Hodgson v. British Arc Welding Co.*, [1946] K. B. 302.

upon a person by the Common Law he is excused if he is prevented from performing it by an act of God—*lex non cogit ad impossibilia* (l); and although it has been held that the same rule applies to a duty created by statute (m), it cannot be laid down as a general rule that the act of God excuses performance of a statutory duty. In *River Wear Commissioners v. Adamson* (n), Lord Cairns said: "If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. . . . If, however, an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God."

Common employment and *volenti non fit injuria* are inadmissible as defences in an action founded on a breach of statutory duty (o), but following the reservation made by Vaughan Williams, L.J., in *Groves v. Wimborne* (*ubi supra*) in favour of allowing the defence of contributory negligence, the House of Lords has held that that defence is admissible even in the case of an absolute duty (p). The contributory negligence of the workman must be such having regard to the circumstances of his work (q), but if the breach of duty is caused by the workman's own act he cannot set it up (r), but this defence does not exclude the operation of the Law Reform (Contributory Negligence) Act, 1945 (s).

New statutory duties with specific remedies.

2. *Specific remedy given for neglect of new statutory duty as excluding other remedies.* If a statute creates a new duty or imposes a new

(l) *Nichols v. Marsland* (1876), L. R. 12 Ex. D. 1. See the authorities cited in Broom's Legal Maxims, 10th ed., p. 162, and especially the statement of the rule by Lindley, L.J., in *Hick v. Rodocanachi*, [1891] 2 Q. B. 626, 638.

(m) *R. v. Leicestershire JJ.*, (1850), 15 Q. B. 88 (service of notice on respondent dispensed with by his death).

(n) (1877), 2 App. Cas. 743, at p. 750, explained in *Makins v. L. N. E. Ry.*, [1943] K. B. 467, 475, *Greene, M.R.*; *Witham Outfall Board v. Boston Corpn.* (1926), 136 L. T. 756, 760, *affd.* (1927), 138 L. T. 382.

(o) *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669.

(p) *Caswell v. Powell Duffryn, etc., Co.*, [1940] A. C. 152; *Lewis v. Denye*, [1940] A. C. 921; *Dew v. United British Steamship Co.* (1928), 139 L. T. 628; and *Flower v. Ebbw Vale Steel, Iron and Coal Co.*, [1934] 2 K. B. 132. On appeal, the House of Lords reversed the actual decision in the latter case, but the question as to contributory negligence was reserved, though Lord Wright, on the assumption that such a defence was good, outlined the nature and amount of negligence necessary to sustain it, [1936] A. C. 206, 214—216. Cp. *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A. C. 1, at p. 27; *Gallagher v. Dorman Long*, [1947] 2 A. E. R. 38.

(q) *Hopwood v. Rolls Royce* (1947), 176 L. T. 514; *Cakebread v. Hopping Bros.*, [1947] K. B. 641.

(r) *Gallagher v. Dorman Long*, *supra*; *Cakebread v. Hopping Bros.* *supra*.

(s) *Cakebread v. Hopping Bros.* *supra*.

liability, and prescribes a specific remedy (t) in case of neglect to perform the duty or discharge the liability, the general rule is "that no remedy can be taken but the particular remedy prescribed by the statute" (u). "Where an Act creates an obligation," said the Court in *Doe d. Bishop of Rochester v. Bridges* (x), "and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner" (y). And in *Stevens v. Jeacocke* (z), the Court said: "It is a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute." And in *R. v. County Court Judge of Essex* (a), Lord Esher, M.R., said, with reference to the question whether a county court judgment debt carried interest under section 17 of the Judgments Act, 1838: "The ordinary rule of construction applies to this case, that where the Legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued."

The result of the application of the rule may even be to oust jurisdiction as in *Barraclough v. Brown* (b), where the question raised was whether an action for a declaration of a right would lie on a statute which gave a new right to recover certain expenses in a Court of summary jurisdiction from persons not otherwise liable. Lord Watson said: "The right and the remedy are given *uno flatu*, and one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary Court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore by plain implication enacted that no other Court has any authority to entertain or decide these matters" (c). And more recently in the Court of Appeal where section 35 of the Local Government Superannuation Act, 1937, was in question, Asquith,

(t) As to criminal remedies, see p. 213 *ante*.

(u) *Stevens v. Evans* (1761), 2 Burr. 1152, 1157. See also *Wake v. Mayor of Sheffield* (1884), 12 Q. B. D. 145. The Legislature may not however have intended the statutory remedy to be exclusive, *Waghorn v. Collison* (1922), 91 L. J. K. B. 735, 736, 738, as *prima facie* there is a right of action, *Monk v. Warbey*, [1935] 1 K. B. 75, 81, *per Greer, L.J.*, *ibid.* 85 *per Maugham, L.J.*

(x) (1831), 1 B. & Ad. 847, 859.

(y) Adopted by Lord Halsbury, L.C., in *Pasmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387, 394.

(z) (1848), 11 Q. B. 731, 741.

(a) (1887), 18 Q. B. D. 704, 707.

(b) [1897] A. C. 615, 622; cf. Local Government Superannuation Act, 1937, s. 8.

(c) In the past the Chancery Division had been disposed somewhat readily to assume the existence of a jurisdiction concurrent with that of justices. In *Grand Junction W. W. v. Hampton Urban District Council*, [1898] 2 Ch. 331, Stirling, J., pointed out that even assuming jurisdiction, the Court would not interfere by injunction or declaration of right save in special circumstances. This case was followed in *Merrick v. Liverpool Corporation*, [1910] 2 Ch. 449, 461, where Eve, J., quoted Jessel, M.R., in *Stannard v. Vestry of St. Giles, Camberwell* (1882), 20 Ch. D. 190 at p. 196 "where the Legislature has pointed out a mode of proceeding before a magistrate, it is not as a general rule for another court to interfere to stop that proceeding by injunction." See however *Stevens v. Chown*, [1901] 2 Ch. 894, 904 Farwell, J., p. 217 *ante*.

L.J., said: "It is undoubtedly good law that where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce that right must resort to this remedy or this tribunal and not to others" (*d*); and it has also been held that by the Pensions Appeal Tribunals Act, 1943, s. 6 (2), an appeal lay to the High Court from decisions of the Minister under secs. 1, 2, 3, or 4 of the Act. Otherwise the decision of the Minister is to be final; so there was no jurisdiction in the Court to entertain a case under section 5 of the Act (*e*).

In accordance with this rule it has been decided that where a statute provides for the settlement of disputes of classes therein indicated by arbitration, the jurisdiction of the Courts to determine such disputes by action is ousted, and the statutory procedure alone can be followed (*f*), and where a new right is given and a particular Court is indicated for its enforcement the High Court's jurisdiction is ousted (*g*).

The true rule for ascertaining whether the special remedy does or does not include a right of action is laid down in *Vallance v. Falle* (*h*), where Stephen, J., said: "The general rule . . . seems in substance to be, that the provisions and object of the particular enactment must be looked at in order to discover whether it was intended to confer a general right which might be the subject of an action, or to create a duty sanctioned only by a particular penalty, in which case the only remedy for breach of the duty would be by proceedings for the penalty." It was held that the penalty prescribed by the Merchant Shipping Act, 1854, was exclusive.

The Court sometimes decides the question in one way and sometimes in another (*i*). It is easier to hold that a right of action has been given to a person, whom upon a fair construction of the Act, the Legislature intended to protect (*j*), but the question of action or no action cannot, however, be solved by asking whether the statute was or was not enacted for the benefit of any particular

(*d*) *Wilkinson v. Barking Corporation*, [1948] 1 K. B. 721, 724.

(*e*) *Morris v. Minister of Pensions*, [1948] 1 A. E. R. 748.

(*f*) *Crisp v. Bunbury* (1832), 8 Bing. 394. *Norwich Corporation v. Norwich Electric Tramway Co.*, [1906] 2 K. B. 119, on s. 33 of the Tramways Act, 1870. Cf. *Crosfield v. Manchester Ship Canal Co.*, [1905] A. C. 421. Contrast *R. W. Paul Ltd. v. Wheat Commissioners*, [1937] A. C. 139.

(*g*) See *Horner v. Franklin*, [1905] 1 K. B. 479, decided on s. 7 of the Factory Act, 1891 (means of escape from fire), and *Stuckey v. Hooke*, [1906] 2 K. B. 20, decided on s. 101 of the Factory Act, 1901 (bakehouses). (Court of summary jurisdiction is by the statute made the arbitrator).

(*h*) (1884), 13 Q. B. D. 109, 110. Approved in *Groves v. Wimborne*, (1898) 2 Q. B. 402; *Saunders v. Holborn D. B. W.*, [1895] 1 Q. B. 64; *Monk v. Warbey*, [1935] 1 K. B. 75, 84, Greer, L.J.

(*i*) Cf. *Saunders v. Holborn D. B. W.*, *supra*; *Phillips v. Britannia Hygienic Laundry*, [1923] 2 K. B. 832; *Groves v. Wimborne*, *supra*; *Britannic Merthyr Coal Co. v. David*, [1910] A. C. 74, and *Monk v. Warbey*, *supra*. See also Beven: Negligence (4th ed.) 395; Robinson's Public Authorities, 1925, p. 114 *et seq.* and 177 L. T. Jo. 219.

(*j*) *Monk v. Warbey*, *supra*, at pp. 81, 85. See also *Reilly v. Moore*, [1935] N. Ir. R. 197.

class or individual, for the duty imposed by the statute may be of such paramount importance that it is owed to the public at large (k).

Right to sue for a penalty not necessarily bar to right of action. But if a statute which creates a duty enacts that an action may be brought by a common informer (l) in case of neglect to perform the statutory duty, this power of suing for a penalty is not to be treated as taking away the right which a person may otherwise have to bring an action for any special damage which he may have sustained by reason of the neglect to perform the statutory duty. And one reason for this is that the two proceedings, viz., for the penalty, and by action for civil remedy, have totally different objects, the one to punish an offence, the other to remedy an injury (m).

Brett, L.J., in *Atkinson v. Newcastle Waterworks* (n), pointed out that it makes no difference whether a penalty imposed for the breach of a statutory duty is or is not to go to the person aggrieved.

Discretionary statutory duties.

3. *Rule as to statutes creating duties being directory only.* "There is a numerous class of cases in which it has been held that certain provisions in Acts of Parliament are directory in the sense that they were not meant to be a condition precedent to the grant, or whatever it may be, but a condition subsequent: a condition as to which the responsible persons may be blamable and punishable if they do not act upon it, but their not acting upon it shall not invalidate what they have done, third persons having nothing to do with that" (o).

"It is stated," said Denman, J., in *Caldow v. Pixell* (p), "that in general the provisions of statutes creating duties are directory." By this is meant not that it is optional on the part of a public functionary whether he will perform duties imposed upon him by statute (q), but that if a public functionary neglects to perform a statutory duty of this kind that neglect on his part will not necessarily invalidate the whole operation with regard to which the statutory duty was to be performed. At the same time it must be borne in mind that it is not a universal rule that statutes which create public duties are merely directory. "In the absence of an express provision, the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative" (r).

The distinction between discretionary and compulsory powers was pointed out by Sir Arthur Channell in the Privy Council in these

(k) See *Atkin, L.J.*, in *Phillips v. Britannia Hygienic Laundry*, *supra* at p. 841; and see *Groves v. Wimborne*, *supra*, at p. 415 and note (s) p. 220 *ante*.

(l) Procedure abolished: Common Informers Act, 1951 (14 & 15 Geo. 6, c. 39).

(m) *Per* Lord Chelmsford in *Wilson v. Merry* (1868), L. R. 1 H. L. (Sc.) 326, 341.

(n) (1877), 2 Ex. D. 441, 449, but see *Salmond on Torts*, 10th ed., p. 508.

(o) *Middlesex Justices v. R.* (1884), 9 App. Cas. 757, 778, Lord Blackburn.

(p) (1877), 2 C. P. D. 562, 566.

(q) See p. 66 *ante*, and *R. v. Mayor of Rochester* (1857), 27 L. J. Q. B. 45, 47, Lord Campbell.

(r) (1877), 2 C. P. D. at p. 566, Denman, J.

words (s): "The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at. . . . When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of acts done."

Section 100 of the Parliamentary Voters Registration Act, 1843, provided that anyone who objected to the retention of a person's name on the list of voters must send his notice of objection by post directed to the person objected to "at his place of abode as described in the said list of voters." In *Noseworthy v. Overseers of Buckland-in-the-Moor* (t), it appeared that the overseers, finding an incorrect address in "the said list of voters," altered it by substituting the true address, and so published it; consequently the objector, who copied from the published list the address of the person he objected to, directed his notice of objection to the substituted address. It was argued that the enactment was imperative, and that, as the notice of objection had not been sent to the address specified in the statute, the notice was invalid and it was so held by the Court. "It is clear therefore that it is the duty of the overseers," said Keating, J., "to publish that which is sent to them, that is a copy of the register It is clear that the duty of the overseers is to publish the list in its integrity just as they receive it. . . . If instead of publishing the copy as they receive it, the overseers take upon themselves to alter it, a person acting upon it does so at his peril. . . . But the words of the Act are express."

Contracts in contravention of statute creating duty.

4. *Avoidance of contract.* One of the most important effects of statutes which create duties or impose obligations (whether they be obligations to do or to refrain from doing some particular thing) is that a contract which involves in its performance, either directly or collaterally (u), the doing of something which would be in contravention of a statute of this kind is held to be invalid and unenforceable (x). This is expressed by the legal maxim, *A pactis*

(s) *Montreal Street Rail Co. v. Normandin*, [1917] A. C. 170, 174.

(t) (1873), L. R. 9 C. P. 233, 238, 239.

(u) Thus, a policy on an illegal voyage cannot be enforced, "for it would be singular if, the original contract being invalid, and therefore incapable of being enforced, a collateral contract founded upon it could be enforced": *Redmond v. Smith* (1844), 7 M. & G. 457, 474, Tindal, C.J.

(x) The general principle that "Illegality may be pleaded as a defence to an action," whether that illegality arise either from the breach of some statutory provision or of a common law principle, was laid down in the leading case of *Collins v. Blanton* (1767), 1 Smith L. C. (13th ed.) 407, and is fully discussed in the notes to that case. See also Williams' notes to Saunders (ed. 1871), vol. i, p. 513, note (c)

privatorum publico juri non derogatur (y), and also in the following rule:—"Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court will lend its assistance to give it effect" (z). "What is done," said Lord Ellenborough in *Langton v. Hughes* (a), "in contravention of the provisions of an Act of Parliament cannot be made the subject of an action." This principle has been acted upon in many cases. It was held in *Clugas v. Penaluna* (b) that a smuggling contract could not be sued upon, because of the obligation created by statute to pay import duty on certain articles. So, also, it being required by 10 Geo. 2, c. 28 (c), that proprietors of theatres should obtain a licence, it was held in *Gallini v. Laborie* (d) that no action could be maintained for breach of an agreement to dance at an unlicensed theatre. Similarly, as 39 & 40 Geo. 3, c. 99, s. 23 (e), required that any persons who carry on the trade of a pawnbroker should cause their name to be painted over their place of business, it was held in *Gordon v. Howden* (f) that an agreement constituting a secret partnership between pawnbrokers was void as being in contravention of that statute. And again, under 7 & 8 Will. 3, c. 4, which prohibited the treating of electors after the teste of the writ for the election, it was held in *Ribbans v. Crickett* (g), that an innkeeper could not recover against a candidate at an election for provisions supplied at his request after the time mentioned in the statute. To make a contract void or unenforceable it is not necessary that the statute should prohibit it under specific penalties or declare it illegal (h). The most conspicuous example is that of gaming contracts and betting, which have again and again been held void only and not illegal or criminal (i).

But it is clear that a contract is void if prohibited by a statute

(y) In commenting upon this maxim Dr. Lushington, *arguendo*, said in *Phillips v. Innes* (1837), 4 Cl. & F. 234, at p. 241, as follows: "It is impossible to compel one who is unwilling to disobey the law to contravene it. He is entitled to plead freedom from a compact into which he should never have entered, and to be protected in maintaining an obedience to the law, which the law would of itself have interposed to enforce, had the act come otherwise within its cognisance."

(z) *Mellis v. Shirley L. B.* (1885), 16 Q. B. D. 446, 452, Cotton, L.J., quoting Parke, B., in *Cope v. Rowlands* (1836), 2 M. & W. 149, 157; *Cowan v. Milbourn* (1867), L. R. 2 Ex. 230, 233, Bramwell, B. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*: 2 Co. Inst. 481. Chitty Contracts, 20th ed., pp. 517-523.

(a) (1813), 1 M. & S. 593, at p. 596.

(b) (1791), 4 T. R. 466.

(c) Superseded by the Theatres Act, 1843, s. 1.

(d) (1793), 5 T. R. 242; *Re Mahmoud and Ispahani*, [1921] 2 K. B. 716, 728.

(e) Superseded by the Pawnbrokers Act, 1872, s. 13.

(f) (1845), 12 Cl. & F. 237.

(g) (1798), 1 B. & P. 264.

(h) *Cowan v. Milbourn* (1867), L. R. 2 Ex. 230, 233, Bramwell, B. Leases rendered void by 13 Eliz. c. 10, and 18 & 19 Vict. c. 124, s. 29, are not merely voidable but absolutely void for all purposes: *Magdalen Hospital v. Knotts* (1879), 4 App. Cas. 324; *Bishop of Bangor v. Parry*, [1891] 2 Q. B. 277. But see *Rickard v. Graham*, [1910] 1 Ch. 722, 729, Swinfen Eady, J.

(i) See *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143, and cases under the Moneylenders Acts, 1900-1927, collected in Chitty Contracts, 20th ed., pp. 1065-1074.

under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition (*k*). The sole question in either case is whether the statute means to prohibit the contract so as to make a contract infringing the prohibition invalid. "If it does so, whether it be for purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it" (*l*). In *Melliss v. Shirley Local Board* (*m*), the surveyor of a local board was sued, jointly with another person, for a sum alleged to be due under a contract between them and the board for the execution of certain drainage works. The action was held not to be maintainable, on the ground that section 193 of the Public Health Act, 1875, had the effect of making the contract illegal. Lord Esher, M.R., stated the rule as follows: "Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law." Bowen, L.J., said: "We have to find out upon the construction of the Act whether it was intended by the Legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence. If you can find out that the act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of the statute. It seems to me plain, from the language of section 193, that there is a prohibition on what has been done. I think no language could be plainer, and the mere fact that certain consequences are, by the latter part of the section, attached to the illegal act does not, in my opinion, render the previous language less clear." So too, the Judicial Committee in *Musgrove v. Chung Teeong Toy* (*n*), held that the infliction of a penalty for bringing by sea more than a certain number of Chinese involved a prohibition, not only upon the shipowner, but upon the immigrants. But where a statute imposed a penalty for revenue purposes on a person delivering a contract note improperly stamped, it was held in *Learoyd v. Bracken* (*o*), that the contract itself was not rendered illegal by failure to deliver a properly stamped note.

(*k*) *Cope v. Rowlands* (1836), 2 M. & W. 149, 157, Parke, B.; and notes to *Collins v. Blantern*, 1 Sm. L. C. (13th ed.) 407.

(*l*) *Smith v. Mawhood* (1845), 14 M. & W. 452, at p. 464, Alderson, B.

(*m*) (1885), 16 Q. B. D. 446, 451, 454. Section 193 of the Public Health Act, 1875, prohibited any officer of a local authority from being interested in any contract made by that authority under a penalty.

(*n*) [1891] A. C. 272; and see to the same effect *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558; *Bonnard v. Dott*, [1906] 1 Ch. 740; *Brightman v. Tate*, [1919] 1 K. B. 463, 469.

(*o*) [1894] 1 Q. B. 114.

Where a contract is rendered illegal, whether by statute or common law, it is for the Court to take notice of the fact, and to refuse to enforce it even if the illegality is not pleaded by the parties to the action (*p*).

Statutory conditions as to contract may not be waived. Where a statute prescribes that a contract shall be in a particular form, or shall or shall not contain certain terms, the statutory form must be followed (*q*). In the absence of express prohibition to the contrary the statutory terms may be waived by the parties to the contract (*r*). But the conditions in the statute may be imposed in such terms that waiver is impossible. In *Netherseal Co. v. Bourne* (*s*), a case on the Coal Mines Regulation Act, 1872, Lord Halsbury said: "The statute discloses the view that the mine-owner and the persons employed in the mine were not, in the contemplation of the Legislature, fit to be trusted to make their own bargains"; and he went on to decide that a protective stipulation in the Act in favour of the miners could not be waived by them, and that the principle, *Quilibet remanere potest juri pro se introducto*, was inapplicable in such a case.

Illegality may be set up after part performance. Even where one party has had the full benefit of a contract which is void for non-compliance with a statute, he may set up the non-compliance as an answer to any claim to make him perform his part of the bargain. This rule is laid down in *Young v. Mayor, etc. of Leamington*, where a sanitary authority set up the want of a seal as an answer to the claim for the cost of constructing public works of which they had taken the benefit (*t*).

Contracts contrary to policy of statute are void. And not only is a contract invalidated which involves in its performance the direct contravention of the statute, but it is also a well-recognised principle of law (*u*) that any contract will be held void, "although not in contravention of the specific directions of a statute, if it be opposed to the general policy and interest thereof." Thus, in *Elliot v. Richardson* (*x*),

(*p*) *Scott v. Brown, Doering & Co.*, [1892] 2 Q. B. 724; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A. C. 461.

(*q*) The innumerable cases on the Bills of Sale Act, 1882, proceed on the admission of this rule, and are devoted to discussion of the modes of evading the terms, or limiting the application of the commands of that Act. See also *Ryan v. Oceanic Steam Navigation Co.*, [1914] 3 K. B. 731, where a contract contained in a passenger ticket by steamer was held void for non-compliance with the statutory form. Cf. *St. R. & O.* 191, No. 1176.

(*r*) *Griffiths v. Dudley (Earl)* (1882), 9 Q. B. D. 357, 364.

(*s*) (1889), 14 App. Cas. 228, 235.

(*t*) (1883), 8 App. Cas. 517. Cf. *Lawford v. Billericay R. D. Co.*, [1903] 1 K. B. 772 and *Chitty Contracts*, 20th ed., pp. 691-697. In Canada, in the case of *London Life Insurance Co. v. Wright* (1880), 5 Canada 466, the Supreme Court, by a majority, restrained an insurance company from setting up a similar defence to an action on a policy issued by the company. See *post*, p. 248; *Sedgwick*, pp. 72, 73.

(*u*) See notes to *Collins v. Blantern* (1767), 1 Smith L. C. (13th ed.) 407. On similar grounds a will is held void if it contravenes the policy of the law; *Re Wilcock's Settlement* (1875), 1 Ch. D. 229. For a case where a contract was held void as opposed to public policy by reason of intended contravention of U.S.A. Prohibition Law, see *Foster v. Driscoll*, [1929] 1 K. B. 470.

(*x*) (1869), L. R. 5 C. P. 744, 749, Willes, J.; *Equitable Life Assurance Socy. of U.S.A. v. Reed*, [1914] A. C. 587, 595; *Farmers' Mart Ltd. v. Milne*, [1915] A. C. 106; *Re Johns*, [1928] Ch. 737.

it was held that an agreement, made between two persons who were creditors of a company which was being wound up, whereby one of them undertook for a money consideration to delay the proceedings of the winding up to the prejudice of the other shareholders and creditors, was void, "as being against the clear intention of the Legislature under the Winding-up Acts." And there are numerous cases of transactions held void as against the policy of the Bankruptcy Acts. But, as has already been pointed out (y), questions of policy are difficult to solve, and it is safer to keep to the manifest intention, express or implied, without turning aside to vague and delusive generalities as to the policy of the general law or of any particular Act.

The Courts will not be astute to construe an Act so as to avoid a contract, or a contract so as to bring it within the prohibition of a statute. Speaking of the Bills of Sale Act (1878) Amendment Act, 1882, Cave, J., said in *Hammond v. Hocking* (z), "The question arises on section 7 of the Act, which was passed for the protection of the borrower from oppression, and, while we construe the Act so as to produce the effect intended by the Legislature, we ought not, in construing it, to give way to needless technicalities, because, if we do so, we shall run the risk of interfering with honest transactions, and also, by rendering bills of sale doubtful and bad securities make the position of the borrower worse than it was before the Act was passed." It is doubtful whether the last consideration is for the Courts, except so far as it is adopted to carry out the intention of the Legislature; and it may be plausibly argued that the inevitable result of the Act was to raise the rate of interest and increase the difficulty of borrowing on the security of chattels.

It is not uncommon in modern statutes to make their provisions applicable notwithstanding any agreement to the contrary, or to forbid contracting out except under conditions prescribed in the statute (a).

In *Wooler v. North Eastern Breweries* (b) it was held that the words "notwithstanding any agreement to the contrary" in section 3 (3) of the Licensing Act, 1904 (re-enacted as section 20 (3) of the Licensing Act, 1910), applied to agreements made before or after the passing of the Act.

Illegal term in contract does not necessarily vitiate the whole contract. Where the contract in question is not merely for the performance of a single act, but involves the doing of several things, some of which are legal and some prohibited by statute, the question has been raised as to whether the whole contract is void, or merely that part of it the performance of which the statute prohibits. It appears to have been

(y) See p. 164 *ante*.

(z) (1884), 12 Q. B. D. 291, 292.

(a) Agricultural Holdings Act, 1948, s. 5; Landlord and Tenant Act, 1927, s. 9; *Salford Union (Guardians) v. Dewhurst*, [1926] A. C. 619, 625, 633; Poor Law Officers Superannuation Act, 1896, s. 10.

(b) [1910] 1 K. B. 247.

laid down in some early cases that if any of the covenants or conditions in a bond be void by statute, then the bond is void *in toto* (c), but it seems that the true rule is that if the contract is for the performance of several things, one of which is prohibited by statute, it is not void *in toto*, unless the prohibiting statute expressly enacts that all instruments containing any matter contrary thereto shall be void, provided the good part be separable from, and not dependent upon, the bad part (d). This view is supported by the decision of the House of Lords in *Netherseal Colliery Co. Ltd. v. Bourne* (e), where it was held that a contract containing a stipulation for illegal deductions from wages, was not void as a whole, but that the illegal stipulations were unenforceable (f). In *Stanton v. Brown* (g), it was held that section 3 of the Ground Game Act, 1880, which makes void every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, "to kill ground game on lands in his occupation, only avoids so much of an agreement as is contrary to the provisions of the Act." And it was held that a reservation of sporting rights contained in a lease, though avoided as to ground game, held good as to winged game (h). If, however, a contract be made on several considerations, one of which is prohibited by statute, the whole will be void because every part of a contract is affected by the illegality of any part of its consideration and the Court will not apportion the consideration between the legal and illegal elements (i).

(c) See notes to *Collins v. Blantyre* (1767), 1 Sm. L. C. (13th ed.) 407.

(d) *Ibid.*; and see *Mouys v. Leake* (1799), 8 T. R. 411; and *Kerrison v. Cole* (1807), 8 East 231. As to severability in contracts generally see *Chitty Contracts*, 20th ed., pp. 469, 482-484.

(e) (1889), 14 App. Cas. 228.

(f) Cf. *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700.

(g) [1900] 1 Q. B. 671.

(h) Cf. *Anderson v. Vicary*, [1900] 2 Q. B. 287; *Sherrard v. Gascoigne*, [1900] 2 Q. B. 279; and the amending Act of 1906 (6 Edw. 7, c. 21).

(i) *Shackell v. Rosier* (1836), 2 Bing. N. C. 634; *Egerton v. Brownlow (Earl)* (1853), 4 H. L. C. 1; *Moulis v. Owen*, [1907] 1 K. B. 746; *Saxby v. Fulton*, [1909] 2 K. B. 208; *Carlton Hall Club v. Laurence*, [1929] 2 K. B. 153. *Chitty Contracts*, 20th ed., p. 58.

CHAPTER II

ENABLING ACTS

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Classification of enabling Acts.

1. Many statutes have been passed to enable something to be done which was previously forbidden or not distinctly authorised by law, with or without prescribing the way in which it is to be done. Such statutes are passed for a variety of purposes. In order to discuss the rules which regulate the effect of statutes of this class, we may conveniently consider the question under the following heads, viz.:—

- (i) Statutes which prescribe or regulate the way in which something is to be done.
- (ii) Statutes which grant to private individuals powers for carrying out some public work.
- (iii) Statutes which enable bylaws and rules to be made.
- (iv) Statutes which empower the Crown to do something, not comprised within the prerogative.
- (v) As respects enactments falling under heads (i)—(iv) the question may also arise whether the enactment is permissive or obligatory.

Acts prescribing or regulating.

2. (i) *Grant of a right implies grant of the means necessary for its exercise.* One of the first principles of law with regard to the effect of an enabling Act is that if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view, "on the principle," as Parke, B., said in *Clarence Ry. v. Great N. of England Ry.* (a), "that *ubi aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest.*"

In *Re Dudley Corporation* (b), Brett, L.J., said that "the general rule under this head of law is, that where the Legislature gives power to a public body to do anything of a public character, the Legislature means also to give to the public body all rights without which the power would be wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only." This rule was applied in the case cited by holding that a sanitary authority, which by statute had authority as against landowners to construct sewers, and a duty in favour of landowners to maintain them, were impliedly entitled to subjacent (but not to lateral) support to the sewers from lands, without purchasing the subjacent soil or any easement of support, but subject to the obligation of making compensation under section 308 of the Public Health Act, 1875. Therefore, as Fry, J., said in *Mayor, etc., of Yarmouth v. Simmons* (c), "when the Legislature clearly and distinctly authorise the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone (d), because the thing cannot be done without abrogating the right." Thus, the power to make bylaws (e) involves the power of enforcing them. In *Doyle v. Falconer* (f) it appeared that the Legislative Assembly of the island of Dominica was constituted by a Royal proclamation (which was there equivalent to an Act of Parliament), but had no special power given to it to punish members for contempt. It was argued, however, that, in accordance with the above-mentioned maxim, such a power was indispensable to its existence, but the Court held that it was not. "It is necessary," said the Judicial Committee, "to distinguish between a power to punish for a contempt and a power to remove any obstruction offered to the deliberations of a legislative body, which last power is necessary for self-preservation. . . . The right to remove for self-security is one

(a) (1845), 13 M. & W. 706, 721.

(b) (1882) 8 Q. B. D. 86, 93, 94. See also *Quebec Railway Co. v. Vaudry*, [1920] A. C. 662; *Lagan Navigation Co. v. Lambe Bleaching Co.*, [1927] A. C. 226; *Farnworth v. Manchester Corporation*, [1929] 1 K. B. 533, 561; [1930] A. C. 171.

(c) (1879), 10 Ch. D. 518, 527.

(d) As to rights being taken away by implication, see p. 111 *ante*.

(e) See pp. 271 *et seq.*, *post*.

(f) (1866), L. R. 1 P. C. 328, 338, 339, Sir J. W. Colville relying on *Kielley v. Carson* (1841), 4 Moore P. C. 63, which "must be taken to have decided conclusively that the Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon or punish for, contempts committed beyond their walls."

thing, the right to inflict punishment is another. The former is all that is warranted by the legal maxim which has been cited, but the latter is not its legitimate consequence.”

Trading corporations, such as railway, canal, and dock companies, are not treated as public bodies within the meaning of this rule, at any rate so far as refers to their compulsory powers of taking land (g).

(ii) *Expressio unius est exclusio alterius*. Another general rule with regard to the effect of an enabling Act is expressed in the maxim, *Expressio unius est exclusio alterius*, “Express enactment shuts the door to further implication” (h). “If there be any one rule of law clearer than another, it is this, that, where the Legislature have expressly prescribed one or more particular modes of dealing with property, such expression always excludes any other mode, except as specifically authorised” (i).

(iii) *Absolute and directory enactments*. When a statute is passed for the purpose of enabling something to be done, and prescribes the way in which it is to be done, it may be either what is called an *absolute* enactment, or a *directory* enactment, the difference being, as explained in *Woodward v. Sarsons* (k) that “an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially”; i.e., that the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission (l).

Absolute enactments. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not. By section 1 of the Justices’ Clerks Fees Act, 1753, the justices in quarter sessions are empowered to alter the table of fees, and, “after the same shall have been approved by the justices at the next succeeding general quarter sessions,” it shall be valid and binding on all parties. The justices of Norfolk made a new table of fees at the June quarter sessions, and submitted it for approval at the next (i.e., October) quarter sessions, but at the October quarter sessions the question of approving it was

(g) *Post*, Part IV, chap. i; *Dr. Foster’s Case* (1615), 11 Co. Rep. 56 b.

(h) *Whiteman v. Sadler*, [1910] A. C. 514, 527, Lord Dunedin. “*Expressum facit cessare tacitum*”: Co. Litt. 183b, 210a.; *R. v. Midland Ry.* (1855), 4 E. & B. 958; *Crayford v. Rutter*, [1897] 1 Q. B. 650; cf. *Allen v. Waters & Co.*, [1935] 1 K. B. 200, 207, Lord Hanworth, M.R.

(i) *Blackburn v. Flavell* (1881), 6 App. Cas. 628, 634. Sir Barnes Peacock quoting *Faucett, J.*, in the Court below who quoted *Hargrave, J.*, in *Drinkwater v. Arthur* (1871), 10 Supreme Court N.S.W. 193, 222. Cf. *Akers v. Howard* (1886), 16 Q. B. D. 739, 753, *Hawkins, J.*; *Hamilton v. Baker* (1889), 14 App. Cas. 209, 217. Lord Watson in discussing s. 191 of the Merchant Shipping Act, 1854; repealed and re-enacted as s. 167 of the Merchant Shipping Act, 1894. But cf. the cautions in the application of this rule in *Lowe v. Dorling*, [1906] 2 K. B. 772, 784, *Farwell, L.J.*; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400, 406, *Wills, J.*; (1889), 21 Q. B. D. 52, 65, *Lopes, L.J.*

(k) (1875), L. R. 10 C. P. 733, 746. As to the distinction cf. p. 212 *ante*.

(l) Cf. Lord Atkin, *Smith v. Cammell Laird*, [1940] A. C. 242 at p. 258.

adjourned to the Epiphany sessions. Consequently it was held in *Bowman v. Blyth* (m) that the table of fees was invalid. "The Legislature," said the Court, "have given a limited power of approval to one particular session only, viz., that next holden after the making of the table of fees. . . . This table was not so approved, and therefore we think that it is not in force." So in *R. v. Loxdale* (n) it appeared that five overseers had been appointed to act for a certain parish, whereas under the Poor Relief Act, 1601, only four, three, or two overseers may be appointed. The Court accordingly declared the appointment invalid. "Justices," said Lord Mansfield, "have no power to appoint overseers but by the special authority given them by Act of Parliament. Therefore this special authority must be strictly pursued, and cannot be exceeded by them" (o). So if an Act of Parliament is passed for the creation of a highway, the provisions of such an Act must be strictly followed, or the creation will not take place (p). And in *Thwaites v. Wilding* (q), Brett, M.R., said of the Lodgers' Goods Protection Act, 1871 (r): "The words of the statute are imperative. It is said that the construction in favour of the defendants will render the statute ineffectual to protect lodgers. I do not think so; the Legislature has imposed conditions, and these conditions must be rigidly complied with in order to deprive the landlord of his remedy at common law and to bring the lodger within the protection of the statute."

Directory enactments. But, on the other hand, if a statute is merely directory, it is immaterial, so far as relates to the validity of the thing to be done, whether the provisions of the statute are accurately followed out or not. Thus, 11 & 12 Vict. c. 63, s. 24 (s), enacted for the purpose of electing a local board of health, "the chairman shall cause voting papers in the form in schedule A" (s) to be distributed among the persons entitled to vote. In *R. v. Lofthouse* (t) voting papers had been distributed which were not precisely in the form given in schedule A, as the column for the number of votes was left blank. It was held that this omission did not vitiate the voting papers nor make the election void. The validity of the election, said Blackburn, J., "depends upon whether the insertion of the number of votes is a condition precedent to the validity of a voting paper, or in other words, whether the requirement of the statute on this head is obligatory. I think the omission does not vitiate the voting paper."

No general rule as to when enabling Acts are absolute and when

(m) (1856), 7 E. & B. 26, 45.

(n) (1758), 1 Burr. 445, 447.

(o) Similarly, in *R. v. Cousins* (1864), 4 B. & S. 849, it was held that the appointment of one overseer (instead of four, three, or two) was invalid.

(p) *Cubitt v. Maxse* (1874), L. R. 8 C. P. 704, per Brett, J., at p. 715.

(q) (1883), 12 Q. B. D. 4, 6.

(r) Superseded as to England by 8 Edw. 7, c. 53.

(s) Repealed and superseded by the Public Health Acts and the Local Government Act, 1894. See Local Government Act, 1933.

(t) (1866), L. R. 1 Q. B. 433, 439.

directory. It being, then, well settled that the neglect of the requirements of an Act which prescribes how something is to be done will invalidate the thing being done, if the enactment is absolute, but not if it is merely directory, we have now to consider whether there is any general rule as to when an enactment is to be considered absolute and when merely directory. "Provisions with respect to time," said Grove, J., in *Barker v. Palmer* (u), "are always obligatory, unless a power of extending the time is given to the Court." The case turned on a provision as to the time within which a summons in county court proceedings was to be delivered to the plaintiff, and the statement of the learned Judge was no doubt made with special reference to rules of legal procedure, in this case the County Court Rules. That the statement cannot apply to all enactments as to time is apparent from the case of *R. v. Leicester JJ.* discussed below (x).

Except as to time, there is no general rule, for while on the one hand we find that enactments expressed in negative and prohibitory language are not universally considered as being absolute, on the other hand enactments expressed in merely affirmative language have sometimes been held to be so. This was plainly stated by Lord Campbell in *Liverpool Borough Bank v. Turner* (y) with regard to enactments expressed in merely affirmative language. "No universal rule," said he, "can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed." In *Howard v. Bodington* (z) Lord Penzance, after citing this *dictum* of Lord Campbell, added as follows: "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory. . . . I have been very carefully through all the principal cases, but upon reading them all the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after

(u) (1881), 8 Q. B. D. 9, 10, but see Law of Property Act, 1925, s. 41.

(x) See p. 243 *post*. See also to the same effect *Barker v. Palmer* (1881), 8 Q. B. D. 9; *Edwards v. Roberts*, [1891] 1 Q. B. 302.

(y) (1861), 30 L. J. Ch. 379, 380. See also *R. v. Kensington I. T. C.*, [1913] 3 K. B. 870, [1914] 3 K. B. 429, on s. 108, Income Tax Act, 1842, "may be assessed . . . shall be assessed and charged," held absolute and not discretionary. In *H. L. sub nom. Kensington I. T. C. v. Aramayo*, [1916] 1 A. C. 215, 231, Lord Wrenbury: *R. v. Letterkenny Union Guardians*, [1916] 2 Ir. R. 18; *Re Bjornstad and Ouse Shipbuilding Co.*, [1924] 2 K. B. 671; *Salford Union (Guardians) v. Dewhurst*, [1926] A. C. 619.

(z) (1877), 2 P. D. 203, 211.

reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Bank v. Turner* " (a).

(iv) *Inferences to be drawn from negative language.* If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and *in no other manner*, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding. By the Quarter Sessions Act, 1814, it is enacted that the Michaelmas quarter sessions shall be held in the week next after October 11 (b). In *R. v. Leicester JJ.* (c) this enactment was held to be merely directory as to the time for holding the sessions. "It has been asked," said Lord Tenterden, "what language will make a statute imperative if 54 Geo. 3, c. 84, be not so. Negative words would have given it that effect, but those used are in the affirmative only." But it does not appear that this can be laid down as a universal rule (d). At all events, it has been held on several occasions that enactments prescribing the formalities which are to be observed in solemnising a marriage are not absolute, although expressed in negative and prohibitory language, and that neglect of these formalities does not invalidate the marriage. Thus, in *Catterall v. Sweetman* (e) it appeared that it was enacted by a colonial Act, that no marriage between Presbyterians and Catholics should be had and solemnised "until one or both of such persons, as the case may be, shall have signed a declaration in writing," and the question was whether a marriage solemnised without the declaration in writing being signed was valid or not. "The words in this section," said Dr. Lushington, "are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void . . . is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has

(a) Cf. the warning given by Lord Sumner in *Salford Union (Guardians) v. Dewhurst*, *supra*, at p. 633. These cases have been followed in the Australian High Court. See *Chanter v. Blackwood*, [1904] 1 Australia C. L. R. 39, 51. *Smith v. Watson*, [1906] 4 Australia C. L. R. 802, 811. Sedgwick, pp. 318—324, considers that "the practice of sanctioning the evasion or disregard of statutes" by treating them as merely directory "has been carried beyond the line of sound discretion." He excuses it, however, on the ground that "strict compliance with all the minute details which modern statutes contain" is impossible, owing to the practical inconveniences likely to result from it, and consequently "sagacious and practical men who desire to free the law from the reproach of harshness and absurdity" are tempted not to enforce strictly all provisions contained in statutes, but to treat them as being merely directory.

(b) See now Criminal Justice Act, 1925, s. 22.

(c) (1827), 7 B. & C. 6, 12.

(d) In *Mayor of London v. R.* (1848), 13 Q. B. 30, at p. 33, note (d), Alderson, B., said during the argument: "The words 'negative' and 'affirmative' statutes mean nothing. The question is whether they are repugnant or not to that which before existed. That may be more easily shown when the statute is negative than when it is affirmative, but the question is the same."

(e) (1845), 9 Jur. 951, 954.

been declared null and void unless there were words in the statute expressly so declaring it." After discussing the various English Acts on the subject of marriage, he continued as follows: "From this examination of these Acts I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the Legislature to create a nullity." On these grounds, therefore, he held the marriage to be valid. A similar (*f*) decision to this had been previously given by Sir John Nicholl, M.R., in *Smallwood v. Tredger* (*g*), a case turning upon Lord Hardwicke's Act (26 Geo. 2, c. 33), s. 1, which enacted that, "in all cases where banns have been published, the marriage shall be solemnised in one of the parish churches where such banns have been published, and in no other place whatever." Sir John Nicholl there decided in favour of the validity of a marriage which had been solemnised at a church different from that at which the banns were published, but, as he said, he took the question on narrow grounds and on its own particular circumstances, without committing himself to the general proposition that in no case would a marriage be void which had been solemnised elsewhere than in the church where the banns were published. His decision was confirmed by the Court of Delegates but without reasons being stated.

(v) *Inferences from affirmative language.* Statutory enactments, although expressed in affirmative language, are sometimes treated as having a negative implied, and that their provisions, "though," as Lord O'Hagan said in *R. v. All Saints, Wigan* (*h*), "affirmative in words, are not necessarily so, if they are absolute, explicit, and peremptory." In Viner's Abr. (*i*) the following rule is laid down: "Every statute limiting anything to be in one form, although it be spoke in the affirmative, yet includes in itself a negative"; and in Bacon's Abr. (*k*), the rule given is, that "if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way." This rule is borne out by the following cases:—In *Stradling v. Morgan* (*l*) the question was whether an action founded upon a statute could be commenced elsewhere than before the justices of Glamorgan at their sessions, for by 34 & 35 Hen. 8, c. 26, it was

(*f*) See also *R. v. Birmingham* (1828), 8 B. & C. 29, where the Court declined to hold a marriage void which had not received consent in the manner required by s. 16 of the Marriage Act, 1823; and *Wing v. Taylor* (1861), 30 L. J. P. & M. 263, where s. 28 of the last-mentioned Act (as to the presence of witnesses) had not been complied with.

(*g*) (1815), 2 Phillimore 287.

(*h*) (1876), 1 App. Cas. 611, 629.

(*i*) Tit. Negative, A. pl. 2.

(*k*) Tit. Statute, G.

(*l*) (1560), Plowd. 198, 206.

enacted that "all actions founded upon any statutes shall be sued by original writ, to be obtained and sealed with the said original seal returnable before the justices at their sessions, within the limits of their authorities, in manner and form before declared." It was contended that these words had a negative meaning, that is to say, that the statute appoints the place, order, and form of such suits, and that the plaintiff cannot sue in any other place or form, and therefore that this action, founded upon a statute, which is appointed to be returned before the justices of Glamorgan, at their sessions, cannot be sued or returned elsewhere or before any other justices. And so it was decided by the Court, and a verdict which had been found for the plaintiff was set aside. In *Amy Townsend's Case* (m) the question was whether the Statute of Uses, ss. 1, 2, which is expressed affirmatively, contained an implied negative. By this statute it was enacted that persons entitled to a use of lands should have the same estate, both according to quantity and quality, in the lands as they had in the use. It was argued that these words contained in themselves a negative, *i.e.*, that the *cestui que use* had an estate in no other quantity or quality than they had in the use, and the reason given was that there is a diversity between a statute which makes an ordinance by affirmative words touching a thing which *was* before at the common law, and a statute which makes an ordinance by affirmative words touching a thing which *was not* before at the common law, and that where, as here, a statute appoints the manner of a thing which *was not* before at the common law, then, although it be expressed in the affirmative, it implies a negative. This argument the Court adopted, and decided that the enactment must be strictly adhered to. In *Trott v. Hughes* (n) Lord Cranworth held that where rules, framed by virtue of a statute for the regulation of benefit building societies, provided that any dispute which might arise between the society and any of its members should be referred to and decided by the directors of the society, the provision was equivalent to enacting that no such dispute was to be made the subject of litigation in a Court of Law, and consequently he dismissed a suit which arose out of such a dispute (o). In *Ex p. Stephens* (p) the question was whether a mere word or distinctive combination of letters was a trade-mark within the meaning of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91) (q). By section 10 of that Act it was enacted that a trade-mark might consist of (among other things) "any special and distinctive word or combination of letters used as a trade-mark *before* the passing of this Act." It was accordingly held that a word which had not been used as a trade-mark

(m) (1554), 1 Plowd. 110.

(n) (1850), 16 L. T. (o.s.) 260.

(o) This view was adopted in *Municipal Building Society v. Kent* (1884), 9 App. Cas. 260.

(p) (1876), 3 Ch. D. 659, 660.

(q) Repealed by the Patents, etc., Act, 1883. The meaning of "trade-mark" is now determined under ss. 9, 10 and 15 of the Trade Marks Act, 1938.

before the passing of the Act could not be used as a trade-mark after the passing of the Act. "Otherwise," said Jessel, M.R., "it would be contravening the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done. Therefore the power to use as a trade-mark a word used before the passing of the Act clearly negatives the conclusion that a distinctive word can be so used if the word was not so used before the passing of the Act" (r).

(vi) *Statutes giving jurisdiction to Courts are usually absolute.* As a general rule, statutes which enable persons to take legal proceedings under certain specified circumstances must be accurately obeyed notwithstanding the fact that their provisions may be expressed in merely affirmative language. Thus, under section 2 of the Summary Jurisdiction Act, 1857, "after the hearing by a justice of the peace of any summary information, either party may, if dissatisfied . . . apply in writing within three days . . . to the said justice to state and sign a case setting forth the facts." In *Edwards v. Roberts* (s) the appellant neglected to get the case stated within the three days prescribed, and it was held, in consequence, that the Court had no jurisdiction to hear the appeal (t). This rule may also be expressed thus—that when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with. It has frequently been decided, even on Acts by which the writ of *certiorari* is taken away, that no justice of the peace can increase his limited jurisdiction by finding facts which do not exist (u).

(vii) *Absolute and directory provisions in same Act.* Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. For "there is a known distinction," as Lord Mansfield said in *R. v. Loxdale* (x), "between circumstances which are of the essence of a thing required to be done by an Act of Parliament and

(r) A statute of New Zealand made in the affirmative creating a close season for "native game" has been held to imply a prohibition against killing such game during the close season: *McKenzie v. Penman* (1902), 21 N. Z. L. R. 210. Applied *Lawson v. Minister of Customs*, [1931] N. Z. L. R. 656, 658. Cf. *Munt, Cottrell & Co. v. Doyle* (1904), 21 N. Z. L. R. 417, 425; *Liston v. Matthews* (1906), 26 N. Z. L. R. 484, 488.

(s) [1891] 1 Q. B. 302.

(t) See also *Peacock v. R.* (1858), 27 L. J. C. P. 224; *Aspinall v. Sutton*, [1894] 2 Q. B. 349.

(u) See Short and Mellor, *Crown Practice* (2nd ed.), 37.

(x) (1758), 1 Burr. 445, 447. Cf. *Equitable Life Assurance Society of U.S.A. v. Reed*, [1914] A. C. 587, where the Privy Council held that a directory section in a New Zealand Act could not be combined with a mandatory one.

clauses merely directory." In *Pearse v. Morrice* (y), Taunton, J., said that he understood "the distinction to be, that a clause is directory where the provisions contain mere matter of direction and nothing more, but not so where they are followed by such words as, 'that anything done contrary to these provisions shall be null and void to all intents.'" In *Heath v. Hubbard* (z) it was argued that a transfer of the property in a ship was rendered invalid if the port officer neglected to give notice of the transfer to the Commissioners of Customs in London as required by 34 Geo. 3, c. 68, s. 16 (a). But it was held that the requirement that notice should be given was directory only, "the vacating provisions being confined to the commission of such acts only as are required to be done by the immediate parties to the sale or transfer, and not extending (as it would be most unreasonable that they should extend) to the acts or omissions of third persons or strangers." The Royal Marriages Act, 1772, which came into question in the *Sussex Peerage Claim* (b), enacts that no descendant of George II shall be capable of contracting matrimony without the previous consent of the King, "which consent," the Act says, "is hereby directed to be set out in the licence and register of marriage." With regard to these words, Tindal, C.J., in delivering the opinion of the Judges in the House of Lords, said that "the only words in that section that are essential to make the marriage a valid marriage are those which require the previous consent of his Majesty, and the words which follow, directing such consent to be set out in the licence and register of marriage, are, as the very words import, directory only, and not essential, and are applicable to those cases only where they can be applied, namely, to the case of a marriage celebrated in England by licence." This question also received a considerable discussion in *Woodward v. Sarsons* (c). The Ballot Act, 1872, contains precise directions as to the way in which voters are to mark their ballot papers, and the question arose in that case as to whether all or any of these directions were imperative or merely directory, for, if they were to be treated as imperative, it was admitted that, in accordance with the general rule (d), any ballot papers not marked precisely in accordance with these directions would have to be rejected as invalid. The Act is divided into two parts—the principal part, and two schedules which contain rules and forms, which rules and forms are in section 28 spoken of as "directions," although it is enacted by the same section that they are to be "construed and have effect as part of the Act." This use of the epithet "directions," as applied to the rules and forms, led the Court to the conclusion that the enactments in the two schedules were to be treated as merely directory, but that those contained in the

(y) (1834), 2 A. & E. 84, 96.

(z) (1803), 4 East 110, 127.

(a) Now replaced by the Merchant Shipping Act, 1894.

(b) (1844), 11 Cl. & F. 85, 148.

(c) (1875), L. R. 10 C. P. 733; *Akers v. Howard* (1886), 16 Q. B. D. 739.

(d) See p. 240 *ante*.

principal part of the Act were to be considered as imperative and absolute. The principles of this decision were also applied in *Phillips v. Goff*, to a General Order relating to the election of a school board, which was subject to the provisions of the Ballot Act, 1872 (e).

(viii) *Impossibility as excuse for non-compliance with absolute provisions.* Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, *Lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse. Section 12 of the Entail Improvement (Scotland) Act, 1770 (f), provides that "the proprietor of any entailed estate (in Scotland) who lays out money in making improvements upon his entailed estate, shall annually, during the making of such improvements, within four months after Martinmas, lodge with the sheriff an account, subscribed by him, of the money expended by him," and then, after the death of such proprietor, his representatives would be entitled to claim the amount so expended from the succeeding tenant in tail. The meaning of the Act came into question in *Campbell v. Earl of Dalhousie* (g). Lord Breadalbane had expended certain sums of money under the Act, but was prevented from accounting to the sheriff in the manner prescribed by the Act in consequence of his death four days before Martinmas. The question then arose as to whether the succeeding tenant in tail was liable to pay these sums of money to the representatives of Lord Breadalbane. The House of Lords held that he was liable, and that, compliance with the provisions of the Act having been rendered impossible by the death of Lord Breadalbane, the omission was to be excused. "If by the act of God," said the Lord Chancellor, "it becomes impossible that the claim can be signed, it appears to me that it would be construing the Act of Parliament in a way in which no clause of the kind has ever been construed, if we held that, where the act of God thus prevented a compliance with the words of a statute, the proprietor or his representatives should thereby be prevented from making a claim for improvements."

(ix) *Conditions dispensed with if merely for benefit of particular class.* If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable. This rule is expressed by the maxim of law,

(e) (1886), 17 Q. B. D. 805. See discussion of these questions with reference to federal elections in Australia: *Chanter v. Blackwood* (1904), 1 Australia C. L. R. 39.

(f) See 31 & 32 Vict. c. 84.

(g) (1868), L. R. 1 Sc. & D. 259, 269, Lord Cairns. Cf. p. 227 *ante*, and *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, 750, Lord Cairns.

Quilibet potest renuntiare juri pro se (h) introducto. As a general rule (i), the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the Court jurisdiction. But if it appears that the statutory conditions were inserted by the Legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court. Where a statute deprives a person of a legal remedy, but does not deny him a cause of action, e.g., the Statute of Frauds or Statute of Limitations, Courts of Justice, whether under the specific rules of procedure or under their general course of practice, treat the right of the defendant to bar the remedy as waived if he does not plead the statute which bars it. "It is evident," said Alderson, B., "that a party who has a benefit given him by statute may waive it if he thinks fit" (j).

In *Wilson v. Mackintosh* (k), an application was made to bring lands under a Real Property Act (26 Vict. No. 9) of New South Wales. A caveat was lodged under section 23, and more than three months thereafter the applicant lodged his case under section 21, and obtained an order that the caveator should file his case. The Judicial Committee said: "Their lordships are of opinion that the maxim '*Quilibet potest renuntiare juri pro se introducto*' applies to this case, that it was competent for the applicant to waive the limit of the three months, and the lapse of the caveat by section 23, and that the respondent did waive it by stating a case and applying for and obtaining an order upon the appellant to state her case, both of which steps assumed and proceeded on the assumption of the continued existence of the contract." And the Committee quoted with approval the following opinion of Darley, C.J. "It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the principle, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts" (l). In *Park Gate Iron Co. v. Coates* (m), Bovill, C.J., said: The provisions of s. 14 (of 13 & 14 Vict. c. 61) (n), "that there shall be

(h) It was pointed out by Lord Westbury in *Hunt v. Hunt* (1862), 31 L. J. Ch. 161, 175, that the words "*pro se*" were "introduced into the maxim to show that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of."

(i) *Ante*, p. 70.

(j) *Graham v. Ingleby* (1848), 1 Exch. 651, 657.

(k) [1894] A. C. 129, 133.

(l) *Phillips v. Martin* (1890), 11 N. S. W. L. R. 153, 158. Cf. *Wright v. John Bagnall & Sons*, [1900] 2 Q. B. 240; *Rendall v. Hills' Dry Docks, etc., Co.*, [1900] 2 Q. B. 245.

(m) (1870), L. R. 5 C. P. 634, 637. In *Wright v. John Bagnall & Sons*, *supra*, it was held that a respondent to a claim under the Workmen's Compensation Act, 1897, might by his conduct be debarred from relying on the six months' limitation imposed by that Act from making a claim to compensation.

(n) Replaced by the County Courts Act, 1888. See now County Courts Act, 1934.

notice of appeal and security, seem to me to have been intended for the benefit of the respondent. It is not a matter with which the public are concerned. If this is so, it falls within the rule that either party may waive provisions which are for his own benefit, and it comes within the case of *Graham v. Ingleby*” (o).

So also, if a statute simply enables a particular class of persons to do or refrain from doing some particular thing under certain circumstances, it is optional with those persons whether they avail themselves of the privilege afforded them by the statute, or whether they waive their right of doing so. In *Hebblethwaite v. Hebblethwaite* (p), the respondent objected to a witness being asked whether she had committed adultery with him, on the ground that it is enacted by section 3 of the Evidence Further Amendment Act, 1869, that “no witness shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery.” The Judge Ordinary held that, as the general intention of the statute was to protect the witness, no objection could be taken to the question by any one else, if the witness herself did not object to answer it. “The provision,” said he, “was not intended to apply to the evidence by which the case of either side was supported independent of the evidence of the parties; it was not intended to narrow the sources of evidence, but to protect the witness” (q).

(x) *Conditions in enabling Act prescribed for public benefit cannot be dispensed with.* But the conditions in an enabling Act which have been prescribed for the purpose of protecting or benefiting the public cannot be dispensed with. By sections 3, 4 of the Australian Courts Act, 1828, a Supreme Court was constituted in New South Wales with the same jurisdiction as the Courts in England. It was therefore held in *R. v. Bertrand* (r), that the principle of English law that a prisoner can waive nothing bound the Court in New South Wales. Consequently, when, upon the disagreement of a jury in a criminal trial, a second trial took place at which the evidence of some of the witnesses was with the prisoner’s consent read over to the jury instead of being given afresh, the trial was held to be void for irregularity, notwithstanding that the prisoner had consented to what had taken place.

When a statutory provision lays down a rule of public policy, neither party to a contract, e.g., of insurance, can contract out of it (s).

(o) See *supra*.

(p) (1869), L. R. 2 P. & D. 29, 30.

(q) A similar rule exists with regard to the protection given to a witness by the common law, whereby a witness may refuse to answer a question on the ground that it tends to criminate him, but if he does not avail himself of this right of refusal, his evidence cannot be objected to as having been improperly received: *R. v. Kinglake* (1870), 22 L. T. (N.S.) 335; cf. the privilege of professional men not to disclose matters affecting their clients in evidence. The privilege is the clients’ who alone can waive it; see as to solicitors, Halsbury’s Laws of England, (2nd ed.) Vol. xxxi. p. 75.

(r) (1867), L. R. 1 P. C. 520.

(s) *Equitable Life Assurance Society of U.S.A. v. Reed*, [1914] A. C. 587, 595, Lord Dunedin.

So, too, in *Barrow's Case* (t), Vice-Chancellor Bacon held that a provision in section 25 of the Companies Act, 1867, that every share should be deemed to be issued for payment in cash unless the same should have been otherwise determined by a contract filed with the Registrar of Joint Stock Companies could not be waived. The learned Vice-Chancellor pointed out that the provision as to filing was passed as much for the protection of the public as in the interests of shareholders, and he added: "The doctrine of estoppel cannot be applied to an Act of Parliament. . . . The Act of Parliament was designed for the protection of creditors. . . . It is the creditors whose rights will be sacrificed if the Act can be violated with impunity." So where an order is a necessary condition precedent to empower the presentment of a bill of indictment against a company at an assize as required by section 33 (1) of the Criminal Justice Act, 1925, and the order, which should have been in writing, was not drawn up till after the bill of indictment had been signed by the clerk of assize, the conviction was quashed (u).

(xi) *Power to incur debts strictly construed.* Power to borrow money must be exercised in exact accordance with the restrictions imposed by the Act conferring the power (x). Powers to do all things necessary to carry out the object of a (local) Act do not authorise the donees of the power to pay as expenses of the earlier Act the costs of a Bill in Parliament for its amendment (y), and the application of borough funds to the expenses of opposing Bills in Parliament is strictly limited by the Borough Funds Act, 1872 (z). But this rule does not apply so as to exempt statutory bodies from liability for negligence in the execution of their statutory powers. Where an Act authorises the levying of a rate to pay for work to be done under the Act, it impliedly authorises a rate to pay for damage done by negligent exercise of the statutory powers (a).

(xii) *Discretionary power given by enabling Act.* Sometimes a statute, passed for the purpose of enabling something to be done, gives a discretionary power to the persons who are to carry out the purpose of the statute. Thus by section 1 of the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, "every authority having power to levy rates upon the occupier of any building used exclusively as a Sunday-school or ragged school may exempt such building from any rate." It was held in *Bell v. Crane* (b), that "it was not the intention that the exemption under the Act should be absolute,"

(t) (1880), 14 Ch. D. 432, 441. Affirmed in C. A. *ib.* p. 443.

(u) *R. v. H. Sherman*, [1949] 2 A. E. R. 207, 210, Lord Goddard, C.J.

(x) *R. v. All Saints, Wigan* (1876), 1 App. Cas. 611.

(y) *Att.-Gen. v. West Hartlepool Commissioners* (1870), L. R. 10 Eq. 152.

(z) *Att.-Gen. v. Swansea Corporation*, [1898] 1 Ch. 602, 604, North, J.

(a) *Gallsworthy v. Selby Dam Drainage Commissioners*, [1892] 1 Q. B. 348.

(b) (1873), L. R. 8 Q. B. 481: cf. *Metropolitan Asylums District Managers v. Hill* (1881), 6 App. Cas. 193; *D. R. Fraser & Co. v. Minister of National Revenue*, [1949] A C 24.

and that it was clear “that the use of the phrase ‘may exempt’ was intended to give a discretion.”

On the other hand where a private Act had provided that certain commissioners “shall and may and are hereby fully empowered to make, alter and maintain all drains” etc., and by another statute “shall have full power and authority and are hereby required to make, alter and keep in repair” drains, etc., it was held that these statutes did not merely confer a discretion but imposed a duty to repair the works (c).

(xiii) *Judicial discretion, how to be used.* If a Court of justice is invested by Act of Parliament with a discretion, “that discretion” (d), said Bowen, L.J., in *Gardner v. Jay* (e), “like other judicial discretions, must be exercised according to common-sense and according to justice, and if there is no indication in the Act of the ground upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run” (f). But, as Lord Blackburn said as to the exercise of discretionary power by a Court of equity, “the discretion is not to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions” (g). Therefore, as Willes, J., said in *Lee v. Bude, etc., Ry.*, (h), if it is intended by the Legislature that a discretion should be exercised, what is meant is “a judicial discretion regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet” (i). “Discretion,” said Lord Mansfield in *R. v. Wilkes* (k), “when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular.”

In discussing section 31 of the Matrimonial Causes Act, 1857, which empowered the Court to pronounce a decree dissolving a marriage, Lord Penzance said, in *Morgan v. Morgan* (l): “A loose and unfettered discretion is a dangerous weapon to entrust to any Court, still more so to a single Judge. Its exercise is likely to be the

(c) *Boynton v. Ancholme Commissioners for Drainage and Navigation*, [1921] 2 K. B. 213.

(d) See generally Robson's Justice and Administrative Law, 3rd ed., p. 400 *et seq.*

(e) (1885), 29 Ch. D. 50, 58.

(f) See *Emma Silver Mining Co. v. Grant* (1879), 11 Ch. D. 918, 926, Jessel, M.R.; and *Ex p. Merchant Banking Co.* (1881), 16 Ch. D. 623. For circumstances under which the Court can interfere with an exercise of a discretionary power see *I. R. C. v. Ross & Coulter*, 1948 S. C. (H. L.) 1, 16, [1948] 1 A. E. R. 616, 629, per Lord Thankerton.

(g) *Doherty v. Allman* (1878), 3 App. Cas. 709, 728.

(h) (1871), L. R. 6 C. P. 576, 580.

(i) “I do not suppose it will ever be held to mean that in all cases the Court of its own will and pleasure or at its own mere caprice will substitute . . . damages for an injunction”: *Holland v. Worley* (1884), 26 Ch. D. 578, 584, Pearson, J.

(k) (1770), 4 Burr. 2527, 2539.

(l) (1869), L. R. 1 P. & D. 644, 647.

refuge of vagueness in decision and the harbour of half-formed thought. . . . This invites public criticism, and shakes public confidence in the justice of the tribunal. I hold, therefore, that the discretion to be exercised by the 31st section of the statute should be a regulated discretion, and not a free option subjected to no rules. It was probably reposed in the Court because the Legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves on the Court."

In modern statutes relating to Church discipline and the regulation of public worship the discretion given appears to be general and absolute, provided that it is exercised *bona fide* (m).

(xiv) *When and by whom statutory power to be exercised.* Where an Act passed after 1889 confers a power, unless the contrary intention appears the power may be exercised from time to time as occasion requires, and, if given to the holder of an office, may be exercised by the holder for the time being of an office (n). It is doubtful whether this applies to powers of making bylaws, at any rate so far as they are given to corporations, inasmuch as corporations cannot be described as holders of office, although individual corporators may hold corporate office. The substantial effect of the provision is to rebut the presumption that the power is exhausted by a single exercise, and to declare that powers given to an official are exercisable *virtute officii* by him and his successors, and are not personal to him. But the presumption created by this enactment is usually excluded with reference to compulsory powers of interference with private property which are generally exercisable only within a limited time after the passing of the Act (o).

Statutory power to execute public works.

3. (i) *Power to be exercised only for purposes specified by the statute.* With regard to the effect of statutes which give power to carry out some object which it is assumed will benefit the public at large, such as making and working a railway or tramway, one of the most important rules is that the power must be strictly adhered to. Although it is not obligatory upon persons who have obtained an Act of Parliament enabling them to form themselves either into an incorporated company (p) or a statutory corporation (q) for some specific purpose, to carry out that purpose, still, if they do proceed to exercise the powers

(m) *Julius v. Oxford (Bishop of)* (1880), 5 App. Cas. 214; and see *Allcroft v. London (Bishop of)*, [1891] A. C. 666.

(n) Interpretation Act, 1889, s. 32 (1), (2), *post* Appendix B.

(o) See Part IV, "Private Acts," *post*.

(p) In *Lindley on Partnership* (11th ed. (1950), p. 26) is pointed out the difference between incorporated and unincorporated companies.

(q) A corporation created by statute for a particular purpose is called a statutory corporation to distinguish it from a corporation at common law. *Per* Lord Selborne in *Ashbury Carriage Company v. Riche* (1875), L. R. 7 H. L. 653, 693; cf. the judgment of Blackburn, J., in same case (1874), L. R. 9 Ex. 224, 263.

conferred upon them by the Act which they have obtained, "it is their bounden duty," as Turner, L.J., said in *Tinkler v. Wandsworth D.B.W.* (r), "to keep strictly within these powers, and not to be guided by any fanciful view of the spirit of the Act which confers them." The doctrine of *ultra vires*, which looms large in modern text-books and cases (s), turns upon the proper mode of applying this principle to the ramifications of modern companies. "One of the best established objects," said Lord Cairns in *Richmond v. North London Ry.* (t), "of the jurisdiction of the Court of Chancery is to take care that companies exercising powers under their Acts shall not exercise them otherwise than for the purposes of the Act, and when there is any ground for supposing that the powers are to be exercised for any other purpose the Court should see whether the company is really misusing its powers." Thus, in *Bright v. North* (u), where commissioners were authorised by statute to levy a rate "for putting the bank of a river into and maintaining the same in a permanent state of stability," it was held by Lord Cottenham that they were justified in applying money raised by the rate in opposing a private Bill which was being promoted to authorise the construction of works which in their opinion would damage the banks of that river. But, as Brett, M.R., said in *R. v. White* (x), such persons would not be allowed to "originate litigation." Thus, in *Att.-Gen. v. Andrews* (y), where a local Act authorised commissioners to raise funds by rate for the purpose of supplying the town of S. with water, and "in otherwise carrying the Act into execution," it was held that they were not authorised thereby to apply their funds in promoting a fresh Bill in Parliament which was to give them more extensive powers, although it was admitted that as in *Bright v. North* (*supra*) they might have applied them in opposing a Bill which they considered would be injurious to their interests. This principle also holds good with regard to powers conferred upon all public bodies. This was pointed out by Lord Hatherley in *Campbell's Trustees v. Police Commissioners of Leith* (z). "In all matters," said he, "regarding their jurisdiction they are, of course, allowed to exercise those powers according to their judgment and discretion; but where they exceed those powers they are immediately arrested by interdict and by injunction, it not being a sufficient answer on their part to say, 'You have your remedy at law.' The Courts will hold a strict hand over those to whom the Legislature has entrusted large powers, and take care that no injury is done by an extravagant assertion of them" (a). This doctrine has been applied so as to require municipal bodies

(r) (1858), 2 De G. & J. 261, 274.

(s) Palmer's Company Law; Street on *Ultra Vires*.

(t) (1868), L. R. 3 Ch. App. 679, 681.

(u) (1847), 2 Phill. 216.

(x) (1885), 14 Q. B. D. 358, 362.

(y) (1850) 2 Mac. & G. 225.

(z) (1870), L. R. 2 H. L. (Sc.) 1, 3.

(a) See also *Mountcashell (Earl of) v. O'Neill (Viscount)* (1854), 5 H. L. C. 937, a decision on the Irish Act, 23 & 24 Geo. 3, c. 39.

authorised to make and work or lease tramways to comply strictly with the terms of their authority (b).

Contracts ultra vires are in all cases invalid. Where a statute confers on a corporation power to make contracts for certain specified purposes, clear words are required to place any limitation on the contractual rights conferred (c). But if companies incorporated under statute make contracts which are *ultra vires*, and consequently invalid, such contracts cannot be made valid by any action on the part of the shareholders, even if such action is unanimous. This question was discussed at great length in *Ashbury Carriage Co. v. Riche* (d). In that case it appeared that a company had been incorporated for a certain purpose which was specified in their memorandum of association, but they had entered into certain contracts which were *ultra vires*. It was argued, however, that inasmuch as these contracts had been ratified and adopted by the whole body of the shareholders they had become binding on the company. But it was held by the House of Lords that the Act under which they had been incorporated had been passed, not only for the benefit of the shareholders, but also for the protection of the public. The Act only permitted the company to make contracts of a particular kind, but if they disregarded the Act of Parliament and went beyond the powers given them by it, as Lord Hatherley said, "no amount of ratification or confirmation by individual shareholders could give validity to the contract in question." "Now I am clearly of opinion that this contract," said Lord Cairns, "was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the power of the Company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified; if it was a contract void at its beginning, it was void because the Company could not make the contract. If every shareholder had been in the room and every shareholder of the Company, had said: 'That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the Company', the case would not have stood in any different position from that in which it stands now. The shareholders would thereby by unanimous consent have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing."

As to the principles enunciated in this case, Lord Selborne said in *Att.-Gen. v. Great Eastern Ry.* (e): "It appears to me to be important

(b) *Eccles Corporation v. S. Lancashire Tramways Co.*, [1910] 2 Ch. 263; *Edinburgh Street Tramways Co. v. Edinburgh Corporation*, [1894] A. C. 456, 463, Lord Herschell, L.C.; *L. C. C. v. Att.-Gen.*, [1902] A. C. 165; *Att.-Gen. v. Manchester Corporation*, [1906] 1 Ch. 643; *Att.-Gen. v. Mersey Railway*, [1907] A. C. 415; *Att.-Gen. v. Leeds Corporation*, [1929] 2 Ch. 291.

(c) *Morris & Bastert Ltd. v. Loughborough Corporation*, [1908] 1 K. B. 205, 216, Lord Alverstone, C.J., 219, Buckley, L.J.

(d) (1875), L. R. 7 H. L. 653, 683, Lord Hatherley, 672, Lord Cairns, L.C.

(e) (1880), 5 App. Cas. 473, 478. See also Lord Blackburn at p. 481; and *Att.-Gen. v. Mersey Ry.*, [1907] A. C. 415; *Att.-Gen. v. Manchester Corporation*, [1906] 1 Ch. 643; *Amalgamated Society of Railway Servants v. Osborne*, [1910]

that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

In *Baroness Wenlock v. River Dee Co.* (f), Lord Watson said, "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions. That appears to me to be the principle recognised by this House in *Ashbury Carriage Co. v. Riche* and in *Att.-Gen. v. Great Eastern Railway Company*."

(ii) *Rights of private persons may be infringed only so far as is absolutely necessary.* There is no doubt that "if on the true construction of a statute it appears to be the intention of the Legislature that powers should be exercised, the *proper* exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of the powers, effect must be given to the intention of the Legislature" (g). There is a presumption that a public body, whether a trading body or not, is not authorised to create a nuisance or otherwise to affect private rights unless compensation is provided. "When statutory powers are conferred," said Cockburn, C.J., in *R. v. Bradford Navigation Co.* (h), "under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impossible without causing one, and so contravening the law of the land, the persons exercising them are liable

A. C. 87, 97. *Ashbury's Case* seems to overrule the opinion of Blackburn, J., in *Taylor v. Chichester Ry.* (1867), L. R. 2 Ex. 356, 379, that a shareholder may waive his right to object to the doing by a company of an unauthorised act, at any rate so far as it covers the case of *ultra vires* contracts. Cf. *Palmer's Company Law* (17th ed.), p. 57 "An *ultra vires* Act cannot be ratified by consent of all the members but an Act which is not within the powers of the directors or is not done in the manner prescribed by the articles, but is within the power of the company, can be ratified by the members without a formal meeting being held." As to chartered companies, see *British S. Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354; [1910] 2 Ch. 502.

(f) (1885), 10 App. Cas. 354, 362 (no statutory authority to cause nuisance).

(g) *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45, at p. 60, Lord Blackburn; cf. *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 313, Lindley, L.J.; *Edgington v. Swindon Corporation*, [1939] 2 K. B. 86.

(h) (1865), 6 B. & S. 631, 648.

to indictment." In *Central Control Board v. Cannon Brewery Co. (i)*, Lord Atkinson referring to what he described as a well-recognised canon of construction said: "That canon is this: that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it, is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms." The rule is also recognised by Sir W. B. Brett, M.R., in *Att.-Gen. v. Horner (k)* where he said: "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it" (k). In the second place, this presumption must yield where the language of the statute is sufficiently clear to authorise the nuisance without compensation. In the third place, if the statute expressly confer a power, but adds a proviso that no nuisance must be created, it is no defence to say that the work in truth cannot be done without creating a nuisance (l). But to lead to this result there must be some element of compulsion or indication of an intention to interfere with private rights (m). On this principle the House of Lords decided that a nuisance caused by a cattle station, though a nuisance at common law, was not actionable, as the station was properly constructed and managed, and nothing had been done which was not incidental and necessary to the carrying of the cattle traffic on the railway (n).

Short of an absolute statutory prohibition against nuisance, the onus lies on a public authority to prove that it was not practicably possible to perform their statutory duty without interfering with the rights of others (o). As Lord Dunedin said in *Manchester Corporation v. Farnworth (p)*: "The onus of proving that the result is inevitable is on those who wish to escape liability for nuisances but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and expense." To provide a defence therefore against liability there

(i) [1919] A. C. 744, 752, quoted in *Marshall v. Blackpool Corpn.*, [1933] 1 K. B. 688; *Bournemouth and Swanage Motor Road and Ferry Co. v. Harvey & Sons*, [1929] 1 Ch. 686, 697, Scrutton, L.J.

(k) (1884), 14 Q. B. D. 245, 257 cited with approval by Greer, L.J., in *Conssett Iron Co. v. Clavering*, [1935] 2 K. B. 42 at p. 58 and by Sir W. Greene, M.R., in *Bond v. Nottingham Corpn.*, [1940] Ch. 429 at p. 435.

(l) *Price's Patent Candle Co. v. London County Council*, [1908] 2 Ch. 526, 543, where these rules are set forth by Cozens-Hardy, M.R. See also *Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners*, [1927] A. C. 343.

(m) *Per Bowen, L.J.*, in the Court of Appeal (1889) 29 Ch. D. 89 at p. 109, approved by Lord Blackburn in H. L. in *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45 at p. 63. In *Metropolitan Asylums District Managers v. Hill* (1881), 6 App. Cas. 193, the statutes under discussion involved no element of compulsion nor any indication of intention to interfere with private rights.

(n) *L. B. & S. C. Ry. v. Truman*, *supra*.

(o) *Provender Millers (Winchester) v. Southampton C. C.*, [1940] 1 Ch. 131, 147, 148.

(p) [1930] A. C. 171, 183.

must be no other reasonable method of performing the legal duty than by inflicting the damage complained of. Sir Wilfred Greene, M.R., said in the case cited above (o): "If the statutory duty could only have been performed (that is, from a reasonable point of view and without calling in the aid of extravagant devices or anything of that kind) by going to that excess, the appellants would have been under no liability, because then they could truly have said that what they did was the only reasonable thing that they could have done in the performance of their duty."

The powers must be properly exercised, i.e., *bona fide* (q); with judgment and discretion (r) and without negligence. "While it is thoroughly well established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to some one . . . an action does lie for doing that which the Legislature has authorised if it be done negligently. And if by a reasonable exercise of the [statutory] powers the damage could be prevented, it is 'negligence' not to make such reasonable exercise of the powers" (s). The case of *L. B. & S. C. Ry. v. Truman* was explained by the Judicial Committee in *Canadian Pacific Ry. v. Parke* (t), as resting on the view of the House of Lords, "That the provisions of the Act which related to the acquisition and use of the yard were intended by the Legislature to be imperative, in the same sense as its provisions relating to the use of the railway, and that no negligence had been shown." But in the Canadian case it was laid down that "wherever, according to the sound construction of a statute, the Legislature authorises a proprietor to make a particular use of his land, and the authority given is in the strict sense of the law permissive merely and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others" (u); and Lord Watson added: "The real question in this case seems to be whether these provisions ought to be construed as being in their substance as well as in their form, permissive only and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or whether they are to be construed as imperative and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility."

Not only will an action lie for negligence in the exercise of statutory

(q) *Westminster Corporation v. L. & N. W. Ry.*, [1905] A. C. 426.

(r) *Galloway v. Corporation of London* (1864), 2 De G. J. & S. 213, 229.

(s) *Per* Lord Blackburn, in *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, 455; followed in *Canadian Pacific Ry. v. Roy*, [1902] A. C. 220, 229, and *Law v. Railway Executive* (1949), 65 T. L. R. 288, 290, and explained by Lord Greene, M.R., in *Fisher v. Ruislip—Northwood U. D. C.*, [1945] K. B. 584, 592, 595, 615; cf. *Lambert v. Lowestoft Corporation*, [1901] 1 K. B. 790; *East Suffolk Rivers Catchment Board v. Kent*, [1941] A. C. 74, 90, and Clerk & Lindsell, Torts, 10th ed. pp. 955-959.

(t) [1899] A. C. 535, 546, 547.

(u) Following *Metropolitan Asylums District v. Hill* (1881), 6 App. Cas. 193.

powers, but also inasmuch as in the exercise of statutory powers both public and private rights may be and are infringed, the persons to whom these powers are granted may not only be restrained from exceeding those powers, but also from infringing upon the rights of other persons in a greater degree than is absolutely necessary for the purpose of effectuating the object for which the powers have been entrusted to them. As Lord Moulton said in *Wilson v. Delta Corporation* (w): "It is the duty of the public body entrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected by the works." Thus, in *R. v. Kerrison* (x), certain commissioners were authorised by statute to make a river navigable, and for that purpose to cut the soil of any persons in order to make a new channel. By virtue of this power they cut through a highway and rendered it impassable; consequently it became necessary to build a bridge over the cut, and the question arose whether these commissioners were liable or not to keep this bridge in repair. The Court held that they were liable. "The Legislature," said Lord Ellenborough, "intended that, so far as regards making the river navigable and cutting new channels for that purpose, neither public nor private rights should stand in their way; but still they must make good to the public in another shape the means of passage over such ways as they were empowered to cut through" (y). This principle was also acted upon in *Oliver v. North Eastern Ry.* (z). In that case the question was whether or not the railway company were bound to keep a level crossing in a proper state for the passage of traffic over it. The Court held that they were. "Where persons," said Blackburn, J., "are authorised by statute to create what would otherwise amount to an indictable nuisance, they are bound, without any express enactment, to put and keep up for the public a proper substitute for the old way," and this view is confirmed by the House of Lords, so far as the creation of the nuisance is necessarily involved in doing what is authorised (a). And where interference with private property is authorised by statute, the person authorised to interfere must strictly adhere to the powers conferred, do no more than the statute has sanctioned, and proceed by the mode (if any) indicated by the Act. But no one, except through the Attorney-General, can interfere in case of breach of the statutory terms of the sanction unless he can show a private damage (b).

(iii) *Objects for which powers are conferred considered in deciding*

(w) [1913] A. C. 181, 187.

(x) (1815), 3 M. & S. 526, 531.

(y) Cf. *Lancashire and Yorkshire Ry. v. Bury Corporation* (1889), 14 App. Cas. 417.

(z) (1874), L. R. 9 Q. B. 406, 409.

(a) *Metropolitan Asylums District Managers v. Hill* (1881), 6 App. Cas. 193, as explained in *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45, 57, by Lord Selborne; and in *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535, p. 258 *ante*.

(b) *Liverpool (Mayor of) v. Chorley Waterworks Co.* (1852), 2 De G. M. & G. 852.

whether they have been exceeded. In deciding what may be done under statutory powers, Courts of law will always take into consideration the objects for which the statutory powers have been conferred. If the powers are conferred in order to enable a body of adventurers like a railway company to construct works which, although of public utility, will or ought to yield to the constructors a lucrative return, those adventurers will always be compelled to confine their operations strictly to the purposes contemplated by the enabling statute; whereas if the powers are granted to some public body, like a corporation or council, solely to enable them to carry out some work of public utility or necessity, like making a new street or constructing a sewer, more latitude will be allowed in the exercise of the powers which have been granted. This distinction was clearly pointed out in *Galloway v. Mayor, etc. of London* (c). In that case the Corporation of London had been entrusted with powers to take land compulsorily in order to make certain public improvements in the City. Under these powers they were proposing to take more land than they absolutely required, whereupon the plaintiff filed a bill for an injunction to restrain them from so doing, on the ground that they were exceeding the powers which had been granted to them. "The case of the appellant, Mr. Galloway," said Lord Cranworth, "rested on a principle well recognised, and founded on the soundest principles of justice. The principle is this: that when persons embarking in great undertakings for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object, that is, for any purposes except those for which the Legislature has invested them with extraordinary powers. . . . It has become a well-settled head of equity that any company authorised by the Legislature to take compulsorily the land of another for a definite object will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing. . . . Now, it must be observed that the Legislature in providing for such an object as that of widening and improving the streets of the metropolis, has to deal with a subject totally different from that of enabling a body of adventurers to form a railway. . . . The railway will become the property of the speculators and will itself repay them (at all events it is anticipated that it will repay them) by the tolls levied on it the outlay they have made. But in the case of a public body like the Mayor and Corporation of the City of London undertaking improvements in the metropolis the matter is very different. When they have made a new or widened an old street they necessarily have incurred a very great expense for which they can get no return. The new or improved street is dedicated to the public, and,

(c) (1866), L. R. 1 H. L. 34, 43, 45, 48, 49. Followed in *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

unlike the railway, yields no profit to those by whom it has been made. The Legislature trusted the respondents to deal with the whole property in the manner which should be considered most conducive to the public interest in forming the new street with as little cost as possible to the frequenters of the new market. . . . It does not seem to me to be unreasonable to suppose that the Legislature left it to the respondents to judge of the best means of carrying into effect the duties entrusted to them."

Statutory corporation must show that powers to be exercised are within its statute. If the Legislature gives a public company power to take certain lands, which are specially described in their Act, for the purpose of their undertaking, it is true that, as Lord Cranworth said in *Stockton, etc. Ry. v. Brown* (d), "it constitutes them the sole judges as to whether they will or will not take these lands, provided only that they take them *bona fide*, with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose." But it is not sufficient for the company to make a mere statement that the purposes for which they are about to exercise their power of taking lands are within the contemplation of the Act; but they must be prepared to prove this in a Court of justice if they are called upon to do so (e).

Powers not to be curtailed. But, although powers given by Act of Parliament must be exercised strictly and not extended, they are not to be curtailed. Thus, in *R. v. South-Eastern Ry.* (f), where the company's Act gave them an option when the railway crossed a turnpike road or public highway either to carry the road over the railway or the railway over the road, a mandamus ordering them to do one of these without showing that it had become impossible for the company to exercise their option was quashed. So, in *London and Blackwall Ry. v. Limehouse Board of Works* (g), where the company's Act, after reciting that "plans, etc., describing the land intended to be taken for the purpose of widenings, enlargements, and for stations, works, and conveniences to be connected therewith . . . had been deposited with the clerks of the peace," empowered the company to widen and enlarge their railway and other works in and upon the lands delineated on the plans, it was held that this power authorised the building of a station upon the lands described, and not only such works as were necessary for merely widening the railway, the station being necessary for the public convenience.

(iv) *Statutory powers of interference with property must be exercised within a reasonable time.* Powers conferred by Act of Parliament

(d) (1860), 9 H. L. C. 246, 256.

(e) *Flower v. London, Brighton and S. C. Ry.* (1865), 2 Dr. & Sm. 330. See further on this point p. 253, *ante*, and *Cripps on Compensation* (8th ed.), 32; *Hodges on Railways* (7th ed.), vol. i, p. 165; *Lewis v. Weston-super-Mare L. B.* (1888), 40 Ch. D. 55; *Stroud v. Wandsworth D. B. W.*, [1894] 2 Q. B. 1.

(f) (1853), 4 H. L. C. 471.

(g) (1856), 26 L. J. Ch. 164.

must, as a general rule, be exercised within a reasonable time after notice has been given to the persons whose property will be affected by their exercise, otherwise the notice will be liable to be treated as being no longer effective. Where powers are given to take lands compulsorily for the execution of works, the exercise of powers must be *bona fide* commenced within the time limited for the completion of the works.

In *Tiverton Ry. v. Loosemore (h)*, Earl Cairns said: "I am disposed to think as I was disposed to think in *Richmond v. North London Ry. (i)*, that if nothing more was done [within the time for completing the works, than giving the notice to treat], and the company have slept on their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase, and in such case the landowner should, as I think, be held to be disabled also."

This question becomes in substance a question of the duration of powers of the Act in question.

(v) *Statutory powers not assignable without statutory permission.* Powers conferred by statute cannot be assigned without express statutory permission to do so. This question has often arisen in disputes between railway companies. Thus, in *Great Northern Ry. v. Eastern Counties Ry. Co. (k)*, Turner, V.-C., declined to enforce an agreement which had been made between these two companies, on the ground that it was void as being "an entire delegation of all the powers conferred by Parliament on the defendants," and "an attempt to carry into effect without the intervention of Parliament what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public" (l).

Acts authorising subordinate legislation.

4. Those enabling Acts which give power to make regulations, bylaws, etc., are dealt with separately in Chap. III, *post*.

Acts giving powers to the Crown.

5. If a power is given to the Crown by statute for the purpose of enabling something to be done which is beyond the scope of the royal prerogative, it is said to be an important constitutional principle that such a power, having been once exercised, is exhausted and cannot be exercised again. Thus Art. 1 of the Union with Ireland Act, 1800, empowered the Crown to assume "such royal style and titles as His Majesty by his royal proclamation shall be pleased to appoint."

(h) (1884), 9 App. Cas. 480, 489.

(i) (1868), L. R. 3 Ch. 679, 681 where Earl Cairns raised the question that compulsory powers of taking land should expire when the time limited for completing the railway had expired, p. 254 *ante*.

(k) (1851), 9 Hare 306, 311.

(l) See *Richmond W. W. v. Richmond Vestry* (1876), 3 Ch. D. 82, 99, Malins, V.-C.; *Re Woking U. D. C. (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300.

This power was exercised immediately after the passing of that Act of Union by proclamation of January 1, 1801 (*m*), and, having been once exercised, the power was exhausted. Therefore, when it was again in 1876 thought expedient to alter the royal style, it was necessary to pass another Act of Parliament in order to enable this alteration to be made, and the Royal Titles Act, 1876, was accordingly passed (*n*). But this rule seems to have been to some extent, if not wholly, abrogated by the Interpretation Act, 1889, s. 32 (*o*), which provides that where an Act passed after 1889 confers a power, then, unless a contrary intention appears, the power may be exercised from time to time as occasion requires, and that where the power is conferred on the holder of an office, it, unless a contrary intention appears, may be exercised by the holder for the time being of the office.

Obligatory and permissive Acts.

6. (i) "*May*" and "*Shall be lawful*" imports a discretion. Statutes passed for the purpose of enabling something to be done are usually expressed in permissive language, that is to say, it is enacted that "it shall be lawful," etc., or that "such and such a thing *may* be done." "*Prima facie*, these words import a discretion, and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative" (*p*). "The words 'it shall be lawful' are words," said Lord Cairns in *Julius v. Bishop of Oxford* (*q*), "making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. These words being, according to their natural meaning, permissive or enabling words only, it lies upon those who contend that an obligation exists to exercise this power to show in the

(*m*) See Stat. R. and O. Revised (edit. 1904), vol. i, tit. Arms, etc., p. 1.

(*n*) It was argued at the time in several of the newspapers that the proclamation which was issued (on April 28, 1876, Stat. R. and O. Revised (edit. 1904), vol. i, tit. Arms, etc., p. 107) contravened this principle, inasmuch as at the end of the proclamation it was stated that money coined after the proclamation should be deemed to be lawful money notwithstanding such addition, "until our pleasure shall be further declared thereupon," as though it assumed that a further proclamation might be issued on the subject at some future date. See now Royal and Parliamentary Titles Act, 1927.

(*o*) *Post*, Appendix B.

(*p*) *Per* Crompton, J., in *Re Newport Bridge* (1859), 2 E. & E. 377, 380. *Fleming & Ferguson Ltd. v. Burgh of Paisley* 1948, S. C. 547, following *Julius v. Bishop of Oxford*, *infra*, at p. 235.

(*q*) (1879) 5 App. Cas. 214, 222.

circumstances of the case something which, according to the principles I have mentioned, creates this obligation.”

(ii) “*May*” sometimes equivalent to “*shall*.” It is, however, a well-recognised canon of construction, as Lord Cairns said in *Julius v. Bishop of Oxford* (r), that “where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised.” And Lord Blackburn said: “The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right.” In *R. v. Bishop of Oxford* (s), “so long ago as the year 1693, it was decided in the case of *R. v. Barlow* (t), that when a statute authorises the doing a thing for the sake of justice or the public (u) good, the word ‘may’ means ‘shall,’ and that rule has been acted upon to the present time . . . and of course the same rule will apply to the words ‘it shall be lawful.’” “That,” said James, L.J., in *Re Neath and Brecon Ry.* (x), “is the usual courtesy of the Legislature in dealing with the judicature.” But, when so employed, this expression, “‘it shall be lawful,’” as James, L.J., went on to say, “means in substance that it shall not be lawful to do otherwise.” Thus the County Courts Act, 1850 (y), enacted that, with regard to certain actions, the Court in which the action is brought “may direct that the plaintiff shall recover his costs.” In *Macdougall v. Paterson* (z), it was held that this enactment was not permissive, but obligatory. “When,” said the Court, “a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority, when the case arises and its exercise is duly applied for by a party interested, and having the right to make the application. For these reasons we are of opinion that the word ‘may’ is not used to give a discretion, but to confer a power upon the Court and Judge, and that the exercise of such power depends, not upon the discretion of the Court or Judges, but upon the proof of the particular case out of which such power

(r) (1879), 5 App. Cas. 214, 225, 241; cf. *Lighton v. Bishop of London*, [1891] A. C. 666. Cf. p. 212 *ante*.

(s) (1879), 4 Q. B. D. 245, 258, *per* Cockburn, C.J.

(t) (1693), 2 Salk. 609.

(u) See hereon Wilberforce, 196—200. In *Julius v. Bishop of Oxford* (1879), 5 App. Cas. 214, 244, Lord Blackburn takes exception to the word “public.” “If by that,” said he, “it is to be understood, either that enabling words are always compulsory where the public are concerned, or are never compulsory except where the public are concerned, I do not think either was meant. . . . In fact, in every case cited (where it has been held that the power must be exercised) it has been on the application of those whose private rights required the exercise of the power.”

(x) (1874), L.R. 9 Ch. App. 263, 264.

(y) Repealed, and replaced by the County Courts Act, 1888. Now County Courts Act, 1934, and Order XLVI of County Court Rules, 1936.

(z) (1851), 11 C. B. 755, 773, Jervis, C.J.

arises" (a). So, also, in *Morisse v. Royal British Bank* (b), the question was whether the Court had any discretion, under section 13 of the Joint Stock Banks Act, 1844, which enacted that "In cases provided by this Act for execution on any judgment . . . such execution *may be issued by leave* of the Court or of a Judge . . . upon motion or summons for a rule to show cause . . . and *it shall be lawful* for such Court or Judge to make absolute or discharge such rule . . . or to make such order therein as to such Court or Judge shall seem fit." As to these words, Cockburn, C.J., said in his judgment: "I was at first disposed to doubt whether the Court did not possess some discretionary power under this section . . . but I very reluctantly yield to the weight of that authority" (c). And Williams, J., added: "The 13th section only defines the mode of enforcing the right. . . The words in section 13 'It shall be lawful,' for such Court or Judge to make such order therein as to such Court or Judge shall seem fit, are a mere expression of the power that is inherent in the Court, *Expressio eorum quæ tacite insunt nihil operatur*. The meaning is that the Court shall make an order, not according to attributive justice, but according to the usage and practice of the Court."

(iii) "*May*" sometimes implies a prohibition. Language *prima facie* permissive may not only make it imperative upon the Court to do the thing which the enactment states that it *may* do, but it may also prohibit that particular thing from being done by the Court in any other way. This was pointed out by Jessel, M.R., in *Taylor v. Taylor* (d). Under section 16 of the Settled Estates Act, 1856 (e), "any person entitled to the possession of the rents and profits of any settled estates for a term of years . . . *may* apply to the Court by petition in a summary manner to exercise the powers conferred by the Act." "When," said Jessel, M.R., "a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted. This section says that the proceeding is to be by petition. It is *enabling*, I know, in form that the application may be by petition, but *no other* process can be adopted. . . . In the same way when a statute says who is the person to petition, that person, *and no others*, shall be entitled."

"Now it has been very clearly settled," said Lord Wensleydale in *Edinburgh, Perth, etc., Ry. v. Philip* (f), "though in the first instance there was some doubt about it, that enabling Acts are not compulsory"; in other words, permissive language, when used in an

(a) Adopted in *Crake v. Powell* (1852), 2 E. & B. 210; cf. *Re Eyre and Corporation of Leicester*, [1892] 1 Q. B. 136, 143 (Arbitration Act, 1889, s. 5, "may" means "must"), distinguished in *Bjornstad v. Ouse Shipbuilding Co., Ltd.*, [1924] 2 K. B. 673 (Court has a discretion under s. 5, and can refuse to make the order except on conditions).

(b) (1856), 1 C. B. (N.S.) 67, 84, 85.

(c) The authority referred to is *Hill v. London and County Assurance Co.* (1856), 1 H. & N. 398, decided about three weeks earlier.

(d) (1876), 1 Ch. D. 426, 431.

(e) 19 & 20 Vict. c. 120.

(f) (1857), 2 Macq. H. L. (Sc.) 514, 526.

Act of Parliament, passed for the purpose of enabling works, such as railways, to be carried out, is not held to be obligatory, so far as to subject the undertakers to a mandamus to complete the undertaking authorised (g). This question was decided in *York and North Midland Ry. v. R.* (h), where the Court of Exchequer Chamber laid it down that a statute enacting that "it shall be lawful" for a company to make a railway did not render it compulsory for the company forthwith to make the railway, but left it optional with them to do so or not at any time as they pleased. Such Acts usually contain both permissive language and imperative language, and it is important to observe the distinction. "The language," said Erle, J., (dissenting in the Queen's Bench) "in respect of making the railway is permissive, not imperative, the distinction between permissive and imperative language being maintained throughout the statutes on this subject. Imperative language is used when a clear duty is to be executed, and permissive language in common understanding would express that the matter is to be optional. Thus, the company are permitted at their option to take lands, turn roads, alter streams, and exercise other powers, and these matters are made lawful for them, but they are commanded to make compensation for lands taken, to substitute new roads for those they turn, and to perform other conditions relative to the exercise of the powers, and these matters are required from them" (i). It is now not unusual to exact penalties for failure to complete an undertaking within the time limited by the special Act (k); and in the case of railway companies a parliamentary deposit is required (l).

(iv) *No obligation to finish work once begun under a permissive Act.* In *York and North Midland Ry. v. R.* (supra) it was also argued that if an Act of Parliament gives to a person or a number of persons permission to do some work, such as taking land compulsorily and making a railway, it may very well be that, if they once commence to exercise those compulsory powers for the purpose of making their railway, they are bound to continue the work until they have completed their railway; in other words, as Jervis, C.J., said (m): "that a work, which in its inception is permissive only, becomes obligatory by part performance." This doctrine was partly recognised by Erle, J., in his judgment in the Court below (n) but the Exchequer Chamber said as to it as follows: "It is unnecessary here to determine the abstract

(g) The observations of the Judicial Committee in *Canadian Pacific Rail. Co. v. Parke*, [1899] A. C. 535, p. 258, ante, as to the imperative character of certain provisions in Railway Acts, do not seem to affect these decisions.

(h) (1853), 1 E. & B. 178, 203, 858, Exch. Chamber affirming Erle, J.

(i) This principle was applied in *Att.-Gen. v. Simpson*, [1901] 2 Ch. 671, 712, to the maintenance as well as to the construction of works under statutory authority, subject to the observation that failure to do the work in respect of which a statutory toll was granted might affect the right to levy the toll.

(k) See 2 Clifford 778.

(l) See the Railway Construction Facilities Act, 1864, s. 41 and the Parliamentary Deposits and Bonds Act, 1892.

(m) (1853), 1 E. & B. 858, 860, 870.

(n) *Ibid.* at p. 206.

proposition that a work, which before it is begun is permissive, is, after it is begun, obligatory. We desire not to be understood as assenting to the proposition of Erle, J. (at p. 206), that 'many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus,' and, on the other hand, we do not say that such may not be the law " (o).

This question seems to have been answered in the negative by the highest authority for in *East Suffolk Rivers Catchment Board v. Kent* (p), the House of Lords held that the appellants were under no obligation under sections 6 and 34 of the Land Drainage Act, 1930, either to repair a sea-wall or to complete the work after beginning it. Lord Porter said: "The sole question in the present case is whether the mere undertaking of a task which the Legislature has empowered an authority to do puts them in the same position as if that task had been imposed as a duty upon them. I agree that it does not."

(o) In *Ex p. A Clergyman* (1873), L. R. 15 Eq. 154, it was held that a clergyman who had taken certain steps towards relinquishing his office under the Clerical Disabilities Act, 1870, might change his mind and cancel the steps he had taken; but see *Reichel v. Bishop of Oxford* (1889), 14 App. Cas. 259.

(p) [1941] A. C. 74, 107.

CHAPTER III

DELEGATED LEGISLATION (a)

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Origin and definition.

1. The law of the land, besides the common law and statute law, includes a great deal of what may be termed subordinate, or "delegated" (b), legislation.

Orders in Council (c), rules, regulations or bylaws made under statutory powers are most conspicuously described by the term subordinate legislation (d). Though the Legislatures of British possessions are not sovereign legislative bodies, Acts or ordinances passed by them are not subordinate legislation in the sense here used,

(a) As to the nature and limits of Prerogative legislation, independent of statute, see *Encyclopædia of the Laws of England* (2nd ed.), vol. xi, p. 449, by Mr. Alexander Pulling.

(b) See *Encyclopædia of the Laws of England* (2nd ed.), vol. iv, p. 486, tit. "Delegated Legislation"; Report of the Committee on Ministers' Powers, Cmd. 4060; Carr's *Delegated Legislation* (Cambridge, 1921), and *Concerning English Administrative Law* (1941); Allen's *Law in the Making* (Oxford, 1930), and *Laws and Orders* (1945); and Anson, vol. ii, pt. ii, p. 247 (1935); Graham Harrison, *Notes on Delegation by Parliament of Legislative Powers* (1931).

(c) For the different kinds of Orders in Council, see *Encyclopædia of the Laws of England* (2nd ed.), vol. x, p. 177, and authorities cited, *supra*, note (b).

(d) The nature of the legislative authority thus delegated or conferred is discussed in Dicey, *Constitution* (1939), c. ii, and pp. 475ff; and Ilbert, c. iii. The Canons Ecclesiastical may be described as a kind of subordinate legislation for the clergy: *R. v. Dibdin*, [1910] P. 57, 120.

and are dealt with separately (*post*, Chap. ix). The forms of subordinate legislation to be dealt with in this chapter are the rules, orders, etc., made by persons or corporations within the United Kingdom under legislative authority of Parliament.

Few statutes form a complete code in themselves as to all the details relating to the subject with which they deal, and therefore in order to understand them it is necessary to include the relevant delegated legislation. "The increasing complexity of modern administration, and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, have led to an increase in the practice of delegating legislative power to executive authorities" (e).

As long ago as 1878 it was stated "Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenient" (f). Thus, power is frequently granted by statute to enable rules, regulations or bylaws (g) to be made by some authority other than the Sovereign and Parliament in respect of some particular matter which is not provided for by the general law of the land.

There has been a remarkable increase in this type of legislation in the last thirty or forty years, and it is estimated that there are in existence about 25,000 orders, rules and regulations made under various statutes of one kind or another. Nowadays even matters of *principle* are being delegated because new legislative projects are not fully considered in Parliament, but are passed hastily and with the object of postponing a decision as to the final shape of the law. The so-called "Henry VIII" clause (h) enables a Minister by order to modify the Act itself (i).

In subordinate legislation the Legislature delegates to some person or body of persons the duty of framing regulations for carrying out the policy and objects of the statute. One of the dangers of delegation, unless controlled, is that the delegate or delegates may in effect legislate without the sanction of Parliament under the guise of issuing orders or regulations under the relevant Act. This in some instances (see *infra*) undoubtedly happens. Although the expansion of this type of legislation is comparatively modern, and largely caused by the national crises in two World Wars, delegation is ancient. The earliest example of it is 11 Edw. 3, c. 1, in 1337, which regulated the export of wool. In 1385, the Statute of the Staple conferred on the King power to regulate the staple. By the Statute of Sewers in the reign of Henry VIII commissioners were appointed "with full power and authority to

(e) Ilbert, p. 36, where are stated the differences between British and foreign methods of legislation.

(f) *R. v. Burah* (1878), 3 App. Cas. 889, 906.

(g) For exceptional powers of legislation on matters of principle and even to impose taxation, see Report on Ministers' Powers, Cmd. 4060, p. 31.

(h) See note (n), *infra*, and text thereto.

(i) Carr, Concerning Administrative Law, p. 44; Allen, *op. cit.*, pp. 100-102.

make, constitute and ordain laws, ordinances and decrees, and further to do all and everything mentioned in the said Commission . . . and the same laws and ordinances so made to reform, repeal and amend, and make new from time to time as the cases necessary shall require in that behalf." "Here, then, was a remarkable blend of delegated powers, legislative, administrative and judicial" (*k*). There were many examples of delegated powers in the period of social and legal reform in the nineteenth century.

The name given to delegated legislation is Administrative Law and this now forms a separate topic in our jurisprudence. The reason for its recent revival and expansion is said to be the new conception of social rights and the consideration of the common good, and its development consists in the placing by Parliament of judicial functions in the hands of State departments or under the jurisdiction of tribunals controlled or appointed by executive ministers, and without appeal to the courts of law (*l*). The necessity for delegation to Ministers and others lies in the fact that Parliament has simply no time for the discussion of details of the legislation it passes. It is probably the only way in which parliamentary government could, as regards its legislative functions, be carried on (*m*). Also, the Houses of Parliament possess no ability to decide technical details—as is shown in the matter of jury service and the Civil Service left to delegated legislation in the Sex Disqualification (Removal) Act, 1919. Further, there may be necessity for speedier action than is possible in the slow-moving procedure of Parliament which does not in fact govern. Government is in the hands of the executive, *i.e.*, the Ministers of the Crown. In an emergency there is need for rapid action by the executive who must be empowered to take the necessary steps to meet it. See the Emergency Powers Act, 1920 (*n*), which enables a state of emergency to be proclaimed "if at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community or any substantial portion of the community, of the essentials of life" (*o*).

(*k*) Allen, *Law and Orders*, 21.

(*l*) Robson, *Justice and Administrative Law*, 3rd ed. (1951), pp. 33, 89, 549. Cf. Allen, *op. cit.*, pp. 170–171.

(*m*) Carr, *Delegated Legislation*, p. 19, quoting Lord Thring's *Practical Legislation* p. 13.

(*n*) 10 & 11 Geo. 5, c. 55. During the 1939–45 war Defence Regulations were made under the Emergency Powers (Defence) Acts, 1939 (2 & 3 Geo. 6, c. 62) and 1940 (3 & 4 Geo. 6, c. 45). These Acts have now expired but many of the Defence Regulations are continued under the Supplies and Services (Transitional Powers) Act, 1945 (9 & 10 Geo. 6, c. 10) and the Emergency Laws (Miscellaneous Provisions) Acts, 1946 (9 & 10 Geo. 6, c. 26) and 1947 (11 & 12 Geo. 6, c. 10). For early emergency statutes see the Statute of Proclamations (31 Hen. 8, c. 8), 2 & 3 Wm. 4, c. 10 (Cholera epidemic) and 9 & 10 Vict. c. 96, s. 5 (other diseases). See Carr, *op. cit.* 22.

(*o*) Emergency Powers Act, 1920, s. 1. No such proclamation remains in force more than a month, but a new proclamation may be issued at or before the end of that period. The Act provides that the occasion of the issue of the proclamation must be forthwith communicated to Parliament and for the summoning of Parliament if

The safeguards against abuse of delegated powers lie in the following: (i) the delegation must be to some trustworthy authority, *e.g.*, a public department, (ii) the limits of the delegated powers should be strictly defined by the statute (*p*), (iii) if the interests of any particular section of the community are likely to be affected it should be consulted by the delegated authority before the regulations are made (*q*). (iv) Publicity. This is extremely important and Judges have from time to time pointed out the difficulty of discovering the relevant rules and regulations affecting any particular line of conduct or branch of industry (*r*). (v) There should be machinery provided for revoking or amending the delegated legislation, *cf.* the Interpretation Act, 1889, s. 32 (3). The provisions for laying the rules before Parliament afford, or should afford, a valuable safeguard (*s*).

At the present time it seems to be the settled policy of the Legislature to confine its efforts to the task of laying down general principles of law, and to delegate to subordinate authorities not only the power of making rules and orders for the purpose of settling the details of the procedure necessary for giving effect to the general principles but even the principles themselves (*t*).

An outstanding example of parliamentary delegation is the Church of England Assembly (Powers) Act, 1919 (*u*). By this Act the National Assembly of the Church of England was established with powers to legislate for the regulation of the Church of England. Two committees were set up. A legislative committee of the Church Assembly and an Ecclesiastical committee, consisting of members of both Houses of Parliament. By section 3 Measures passed by the Church Assembly are to be submitted by the legislative committee to the Ecclesiastical committee which considers them, with or without consultation with the legislative committee. The Ecclesiastical committee drafts a report to Parliament stating the nature and effect of the Measure and its views as to its expediency especially with reference to constitutional

necessary. For the exercise of these powers in 1921, see list of spent emergency orders at pp. 1612-7 of the annual volume of Statutory Rules and Orders for 1921. For the proclamation of a state of emergency on March 28, 1924, and the revocation thereof on April 1, 1924, see the London Gazette, April 1, 1924. The Proclamation of April 30, 1926, the 1926 code of Emergency Regulations and various subsidiary directions and orders (as to coal, explosives, milk, pitch, traffic, etc.) in force during the 1926 period of emergency (the general strike) were printed in S. R. & O. 1926 at p. 485. For the exercise of these powers in 1945 in relation to certain dock strikes, see S.I. 1949 No. 1300. See also Allen, *op. cit.* pp. 206, 207.

(*p*) Carr, *op. cit.* 29. But the degree to which this rule is observed may be judged after a study of s. 1 of the Supplies and Services (Transitional Powers) Act, 1945 (9 & 10 Geo. 6, c. 10).

(*q*) *E.g.*, *Rollo v. Minister of Town and Country Planning*, [1947] 2 A. E. R. 488, affirmed, [1948] 1 A. E. R. 13.

(*r*) *Cf.*, *e.g.*, Scott, L.J., in *Blackpool Corpn. v. Locker*, [1948] 1 K. B. 349, 362, 369, and in *Jackson Stanfield & Sons v. Butterworth*, [1948] 2 A. E. R. 558, 565.

(*s*) See p. 277, *post*.

(*t*) *E.g.*, The Seeds Act, 1920; Air Navigation Act, 1920; Roads Act, 1920; Local Government (Boundary Commission) Act, 1945, s. 5 (1) (3); Town and Country Planning Act, 1947, s. 70 (3).

(*u*) 9 & 10 Geo. 5, c. 76.

rights. The legislative committee has no power to vary a Measure of the Church Assembly either before or after conference with the Ecclesiastical committee. The report is not to be presented to Parliament until the legislative committee desires it to be presented. By section 4 the report (if any) together with the text of the Measure is to be laid before Parliament. On a resolution being passed by each House of Parliament directing that such Measure in the form laid before Parliament, *i.e.*, without amendment, shall be presented to His Majesty, such Measure shall be presented to His Majesty and shall have the force of an Act of Parliament on the Royal Assent being signified as in the case of other Acts of Parliament.

These Measures are occasionally opposed in Parliament: a notable example being the successful opposition to the proposed Revised Book of Common Prayer in 1928.

General statutory provisions.

2. The following general rules (x) apply to subordinate legislation:—

Time for exercising powers. Where an Act (public, local and personal, or private) passed after 1889 is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations or bylaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement of the Act, subject to this restriction, that any instrument made under the power shall not come into operation until the Act comes into operation, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation (y).

Power of revocation. In Acts prior to 1890 which authorise the making of rules, regulations or bylaws, a power of rescission or variation must, it would seem, be given expressly or by necessary implication in order to authorise any alteration of the rules, etc., when once made; and without such power the rule-making authority is *functus officio* on the first exercise of the power (z).

But “where an Act (public, local and personal, or private) passed after 1889 confers a power to make any rules, regulations, or bylaws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner, and subject to the

(x) See *Jones v. Robson*, [1901] 1 K. B. 673.

(y) Interpretation Act, 1889, ss. 37, 39, *post*, Appendix B. *R. v. Minister of Town and Country Planning, Ex. p. Montague Burton*, [1951] 1 K. B. 1.

(z) See p. 263 *ante*.

like consent and conditions, if any, to rescind, revoke, amend, or vary (a) the rules, regulations, or bylaws" (b). This rule does not extend to Orders in Council, orders, warrants, schemes, or letters patent (c).

The result of this enactment is to permit revocation of many kinds of rules and bylaws without reference to Parliament. But the revocation and the substituted rules are as much subject to judicial examination as the original rules.

"I should certainly have been prepared to hold apart from authority that where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done" (d).

Interpretation. "Where any Act (public, local and personal, or private) passed before or after 1889 confers power to make, grant, or issue any instrument—that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bylaws—expressions used in the instrument, if it is made after 1889, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power" (e).

This enactment adopts the rule already established, that any particular term or word used in a rule or bylaw should *prima facie* receive the same interpretation as would be applied to that word or term when used in the Act under the powers of which the bylaw is framed. But there may be occasions when it is obvious that the words are used in the bylaw in a different sense to that in which they are used in the Act (f).

Distinction from statute law.

3. The initial difference between subordinate legislation (of the kind dealt with in this chapter) and statute law lies in the fact that a subordinate law-making body is bound by the terms of its delegated or derived authority, and that Courts of law, as a general rule, will not give effect to the rules, etc., thus made, unless satisfied that all the conditions precedent to the validity of the rules have been fulfilled. The validity of statutes cannot be canvassed by the Courts, the validity of delegated legislation as a general rule can be. The Courts therefore

(a) If subsequent bylaws are inconsistent with former bylaws, the latter, if validly made, prevail: *Gosling v. Green*, [1893] 1 Q. B. 109, 112, Pollock, B.

(b) Interpretation Act, 1889, ss. 32 (3), 39, *post*, Appendix B.

(c) This appears from the deliberately different wording of ss. 32 (3) and 37 of the Interpretation Act, 1889, *post*, Appendix B.

(d) *Willingale v. Norris*, [1909] 1 K. B. 57, 64, Lord Alverstone, C.J. This case turned on regulations made for London under the Hackney Carriages Acts. See *R. v. Walker* (1875), L. R. 10 Q. B. 355, where disobedience to an order on a matter of public concern made by commissioners under the Epping Forest Act; and *R. v. Harris* (1791), 4 T. R. 202, where disobedience to an Order in Council made under a Quarantine Act were held indictable.

(e) Interpretation Act, 1889, s. 31, *post*, Appendix B.

(f) *Blashill v. Chambers* (1885), 14 Q. B. D. 479, 485, Grove, J.

(1) will require due proof that the rules have been made and promulgated in accordance with the statutory authority, unless the statute directs them to be judicially noticed (g); (2) in the absence of express statutory provision to the contrary, may inquire whether the rule-making power has been exercised in accordance with the provisions of the statute by which it is created, either with respect to the procedure adopted, the form or substance of the regulation, or the sanction, if any, attached to the regulation (h); and it follows that the Court may reject as invalid and *ultra vires* a regulation which fails to comply with the statutory essentials. For instance in *Nicholls v. Tavistock U. D. C.* (i) a bylaw prohibiting sales by auction in a market was held invalid as repugnant to the laws of that part of the United Kingdom in which Tavistock was situated within s. 2 of the Market and Fairs Clauses Act, 1847 (k).

Classification.

4. "Subordinate legislation," falls under three main heads:

- (a) Prerogative Orders in Council, governmental acts independent of any special statutory authority. This kind of subordinate legislation is used chiefly in the case of the Crown Colonies and the regulation of trade and commerce in time of war (l). In *The Zamora* (m) the right of the Crown to requisition enemy or neutral property was held to be a matter open to judicial review. Nor is the Crown entitled either by its prerogative or by statute to take possession of a subject's property and use it for purposes of defence without paying compensation (n). This kind of Order is relatively rare and is unimportant for our present purpose.

(g) *Institute of Patent Agents v. Lockwood*, [1894] A. C. 347.

(h) Cf. London Traffic Act, 1924, s. 10 (3) which provides for maximum penalties. Ilbert, *Legislative methods and forms* (1901), p. 310.

(i) [1923] 2 Ch. 18.

(k) Cf. *Slattery v. Naylor* (1888), 13 App. Cas. 446, 452. See generally Street on *Ultra Vires* (1930), and see *R. v. Local Government Board* (1882), 10 Q. B. D. 309; *R. v. Halliday*, [1917] A. C. 260; *Chester v. Bateson*, [1920] 1 K. B. 829; *Re Clifford and O'Sullivan*, [1921] 2 A. C. 570; *R. v. Electricity Commissioners*, [1924] 1 K. B. 171; *Roberts v. Hopwood*, [1925] A. C. 578; *Minister of Health v. The King, ex p. Yaffé*, [1931] A. C. 494; *Berney v. Att.-Gen.*, [1947] L. J. R. 983; *Re a Debtor* (No. 277 of 1950), [1950] Ch. 95. For instances where Defence Regulations have been challenged see *R. v. Halliday*, [1917] A. C. 260; *Lipton & Co. v. Ford*, [1917] 2 K. B. 647, 654; *Newcastle Breweries Ltd. v. R.*, [1920] 1 K. B. 854; *Brightman v. Tate*, [1919] 1 K. B. 463; *Robinson v. The King*, [1921] 3 K. B. 183. See also *Wilmot v. Grace*, [1892] 1 Q. B. 812, 816; *R. v. Minister of Transport*, [1934] 1 K. B. 297. Cf. p. 297, *infra*.

(l) Allen, *op. cit.*, 44.

(m) [1916] 2 A. C. 77.

(n) *Re De Keyser's Royal Hotel*, [1919] 2 Ch. 197. Affd. *sub. nom. Att.-Gen. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

- (b) Statutory rules (o); or, as they are now called, Statutory Instruments. Any document whereby powers exercisable by Orders in Council or by a Minister to carry out subordinate legislation are exercised is a Statutory Instrument (p).
- (c) Bylaws or regulations made—
 - (i) by authorities concerned with local government (q).
 - (ii) by persons, societies or corporations (whether by common law or statute) who are conducting commercial or other enterprises, whether of a public character or not.

These are considered at p. 296 *et seq* below.

Statutory Instruments.

5. *Definition.* Statutory rules were formerly defined by the Rules Publication Act, 1893, as “Rules, regulations, or bylaws made under any Act of Parliament which

- “(a) Relate to any Court in the United Kingdom, or to the procedure, practice, costs or fees therein, or to any fees or matters applying generally throughout England, Ireland, or Scotland; or
- “(b) Are made by His Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary of State, or any other Government department.”

This Act has been wholly repealed by the Statutory Instruments Act, 1946, which provides by s. 1 (2) that where by any Act passed before its commencement power to make statutory rules within the meaning of the Rules Publication Act, 1893, was conferred on any rule-making authority within the meaning of that Act, any document by which that power was exercised after the commencement of the Act of 1946, shall, save as is otherwise provided by regulations made under the Act of 1946, be known as “statutory instruments” and the provisions of the 1946 Act shall apply thereto accordingly.

Section 9 (1) of the Act of 1946 gives power to extend the Act to

(o) From January 1, 1948 statutory rules and orders are replaced by statutory instruments controlled by regulations made under the Statutory Instruments Act, 1946; see S. I. 1948, Nos. 1, 2, and 3 *infra*. On this subject see the article in *Encyclopædia of the Laws of England* (2nd ed.), vol. xiii, p. 617, by Mr. Alexander Pulling, the official Registrar of Statutory Rules and Orders; Carr's *Delegated Legislation* (Cambridge, 1921); Allen's *Law in the Making* (Oxford, 1930); Robson's *Justice and Administrative Law* 3rd ed., 1951; Port's *Administrative Law and Report on Minister's Powers*, Cmd. 4060.

(p) Statutory Instruments Act, 1946, s. 1.

(q) See Robinson's *Public Authorities and Legal Liability* (1925); Redlich and Hirst's *Local Government in England* (1903), ii.

cases where power to confirm or approve was conferred on a Minister by any Act passed previous to 1948, but the exercise of that power did not constitute the making of a statutory rule within the meaning of the Rules Publication Act, 1893, and where it appears expedient to His Majesty in Council that the provisions of the 1946 Act should apply to such cases. Any document whereby such power is exercised after a specified date shall be known as a statutory instrument. By the Statutory Instruments (Confirmatory Powers) Order, 1947 (S.I. 1948 No. 2) Article 2, this purpose is carried out and the schedule contains seven statutes enacted before 1948 and the orders made thereunder to which this section applies.

Statutory Instruments, 1948, No. 2, Article 1 (1), provides that when a Minister exercises a power conferred by an Act previous to the Act of 1946 to confirm or approve an order, rules or regulations made by an Authority which is not a rule-making authority as defined by the Rules Publication Act, 1893, and the subordinate legislation so confirmed or approved being of a legislative and not executive character, is required to be laid before Parliament or the House of Commons, then, subject to the operation of paragraph 2 of this article, any document by which that power is exercised, after the coming into force of this order, shall be known as a statutory instrument and the provisions of the Act of 1946 shall apply.

Thus instruments not only directly made by but confirmed and approved by a Minister become statutory instruments under the Act.

Until the publication in 1891 (under the supervision of the Statute Law Revision Committee) of an index to the innumerable regulations and orders made by the various departments of Government, it was impossible to realise, or even to discover without great research, what rules or regulations were in force under any given Act. Official indexes originally brought down to the end of 1909 under the editorship of the late Alexander Pulling, are now published every three years which, with the aid of the "Statutory Rules and Orders and Statutory Instruments Revised" (*r*) and the annual volumes of statutory instruments enormously increases the accessibility of the growing body of subordinate legislation.

Secondary evidence admissible. *Prima facie* evidence of all statutory rules and orders and statutory instruments may now be given in accordance with the provisions of the Documentary Evidence Act, 1882, s. 2, by production of a copy of the London, Edinburgh and Dublin Gazettes or a King's Printer's copy or a certified copy as provided by the Act and by various later Acts dealing with particular Government departments (*s*).

(*r*) 3rd edition (1951) is now in course of publication. This includes statutory rules and orders and statutory instruments to the end of 1948.

(*s*) This Act amended the Act of 1868. All documents printed under the superintendence of the Stationery Office are to be received in evidence. Cf. s. 4 of this Act and *R. v. Vos* (1895), 6 Queensland L. J. 215. See Taylor on Evidence, 12th ed., Part III, chapter iv. §§ 1527ff.

Validity of statutory instruments.

6. Statutory rules and orders and statutory instruments form by far the most common type of subordinate legislation—sometimes by the King in Council, sometimes delegated to individual Ministers of the Crown or to other authorities; and attention will consequently be confined to a consideration of these in this part of this chapter. As explained above, they derive their validity from statutes. The question now arises as to their validity. This may be considered from two aspects—(a) the control exercised over them by Parliament; (b) their subjection to the rule of law, *i.e.*, challenge in the Courts.

(a) *Control of statutory instruments by Parliament.* This is said by an eminent authority to be “most ineffective” (t) as regard procedure in the House for the annulment of a statutory order:

(i) The statute may require that the rules made under it shall be laid before the House “as soon as may be”. By some statutes it is expressly enacted that if the rules are not laid, they shall have no effect. For instance the Town and Country Planning Act, 1947, s. 69 (5) provides that regulations made for the purpose of paragraph (b) of the proviso to subsection (2) of the section shall be of no effect unless they are approved by resolution of each House of Parliament (u).

There is generally no provision for amendment of the rules by the House. Questions may be put to the Minister or the matter may be discussed on the motion for adjournment or in the debate on the King’s Speech at the opening of the session. Generally speaking the rules must be accepted or rejected but occasionally the “parent” Act gives power to modify or amend, for instance the Government of India Act, 1935, s. 475 (1); Ministry of Health Act, 1919, s. 8 (3) and the Nurses Registration Act, 1919, s. 3 (4).

(ii) The statute may provide that the Act is not to come into force before a certain time to be determined by Order in Council, *i.e.*, the “appointed day” clause, as for instance in the National Health Service Act, 1946, and the Town and Country Planning Act, 1947.

(iii) The Rules may be directed to lie for a specified time subject to a prayer for annulment. Subject to this the rules become effective immediately. This is called the method of Negative Resolution (x), and is most usually employed. It appears to be the method contemplated by the Statutory Instruments Act, 1946, s. 5.

(iv) Rules to lapse unless approved. This is the method of Affirmative Resolution. For example the Orders of the Board of Trade under the Safeguarding of Industries Act, 1921. A good example is *Metcalfe v. Cox* (*infra*, p. 289).

(t) Lord Hemmingsford in his evidence before the Donoughmore Committee (1932).

(u) For early examples see 3 & 4 Vict. c. 94; 13 & 14 Vict. c. 35; 44 & 45 Vict. c. 44.

(x) See the Supplies and Services (Transitional Powers) Act, 1945 (9 & 10 Geo. 6, c. 10), s. 4.

(v) Sometimes it is directed that orders shall be of no effect unless they are approved by resolution of each House of Parliament. See for an example the Town and Country Planning (Development Charge Exemptions) Regulations 1950 (S.I. 1950 No. 1233), made under s. 69 of the Town and Country Planning Act, 1947.

(b) *Control of statutory instruments by the Courts.* Since in our law Parliament is supreme the question whether a statute is constitutional cannot be argued in our Courts. But the validity of rules made under statutory authority may be inquired into by the Courts though the statutory rule making powers tend to narrow the field of inquiry by giving Ministers a wide discretion. Dr. Robson, an advocate of the expansion of administrative law, boldly says that if administrative law is useful, it must be accepted as a system independent of Courts of law. Farwell, L.J. observed in *Dyson v. Att.-Gen.* (a), "as it is, the Courts are the only defence of the liberty of the subject against departmental aggression".

The question is therefore how far the doctrine of *ultra vires* can be applied to these Rules and Orders. The answer is not simple or easy as the powers of the delegated authority naturally vary. As to actual misuse of powers, Lord Goddard, C.J., in *Berney v. Att.-Gen.* (b) said: "It may be, though it is not necessary to decide it, that if the competent authority, in this case a government department, use the powers given by an Order under a Defence Regulation for some purpose wholly unconnected with the Regulation or the Order, they could not justify their action either under the Regulation or under the Order, as the answer would be that they were not acting under it, but if their action has to do with the purpose or the Order, then I think that the only thing that a Court can do is to say whether they have done it within the words of the Order itself." "One has to bear in mind that when the Legislature confers powers on a Minister it is conferring powers on a person who, presumably will use those powers, not only bona fide but in a responsible spirit and in the true interests of the public and in furtherance of the objects for the attainment of which the powers were conferred" (c). All that can be done is to give some illustrations from the numerous cases which have come before the Courts, premising that the Courts will interfere where the delegated authority, Minister or other, has acted without jurisdiction. In *Carltona Ltd. v. Commissioners of Works* (d), a factory was requisitioned and supplies and labour were stopped. The authority was the Defence (General) Regulations, 1939, Regulation 51 (1). The Court of Appeal held that Parliament had committed to the executive the discretion

(a) [1911] 1 K. B. 410, 424.

(b) [1947] L. J. R. 983, 989.

(c) *Land Realization Co. Ltd. v. Postmaster-General* (1950), 66 T. L. R. (Pt. 1) 985, 991, *per* Romer, J.; [1950] Ch. 435.

(d) [1943] 2 A. E. R. 560, 564, *fold.* *Lewisham B. C. v. Roberts*, [1949] 2 K. B. 608; *Minister of Agriculture & Fisheries v. Matthews*, [1950] K. B. 148.

of deciding when an order for requisition should be made under the regulation and with that discretion, if *bona fide* exercised, the Courts could not interfere. Lord Greene, M.R., said: "All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that the powers are exercised in good faith. Apart from that the Courts have no power at all to enquire into the reasonableness, the policy, the sense or any other aspect of the transaction." The same ouster of the jurisdiction of the Courts appeared in *Horton v. Owen* (e), where a direction to perform certain work, which meant sending an unfit man away from home, could not be objected to on the ground of unreasonableness if the direction were duly made. These cases illustrate the rule that a statutory order or regulation is not invalid on account of unreasonableness, although a bylaw may be (see *infra*, p. 302).

We now proceed to illustrate, from more or less recent cases, the effect of some forms of subordinate legislation. In *Point of Ayr Collieries Ltd. v. Lloyd George* (f) the control of the appellants' undertaking was assumed by the Ministry of Fuel and Power under Regulation 55 (4) of the Defence (General) Regulations, 1939. It was contended that there were no valid grounds for the Minister's decision to take over control. The Court of Appeal held that it had no power to interfere with what was admittedly a *bona fide* decision of the Minister within his delegated authority. The exercise of an executive power under such a regulation cannot be questioned in the Courts but only in Parliament. A similar decision was reached by the Court of Appeal in *Robins & Sons Ltd. v. Minister of Health* (g). In *Land Realization Co. Ltd. v. Postmaster-General* (h) it was said to be "well settled that where a statutory provision empowers a Minister to do something of which he is satisfied with regard to a certain state of affairs, a statement by him that he is so satisfied will be accepted in these Courts."

On the other hand in *R. v. Minister of Health, ex p. Dore* (i), the Minister's action in remitting a surcharge on the councillors of Poplar, purporting to act under section 4 of the Poor Law Amendment Act, 1848, was declared to be *ultra vires*. The Court of Appeal also declared that the Minister of Transport had no power under section 22 of the Electricity (Supply) Act of 1928 to settle the amount of monetary compensation due from an electricity authority for rights over the land of a private owner (k). Nor was a scheme for mere demolition without proposals for the replacement, reconstruction or substitution

(e) [1943] 1 K. B. 111. Cf. *R. v. Comptroller of Patents*, [1941] 2 K. B. 306; *Progressive Supply Co. v. Dalton*, [1943] Ch. 54; *Morris v. Minister of Pensions*, [1948] 1 A. E. R. 748.

(f) [1943] 2 A. E. R. 546, 547; *Thorneloe & Clarkson v. Board of Trade* (1950), 66 T. L. R. 1117, 1120.

(g) [1939] 1 K. B. 537.

(h) (1950), 66 (Pt. 1) T. L. R. 985 at p. 992, *per* Romer, J; [1950] Ch. 435.

(i) [1927] 1 K. B. 765.

(k) *West Midlands J. E. A. v. Pitt*, [1932] 1 K. B. 1.

of dwelling-houses a valid scheme within the Housing Act, 1925 (*l*). In *Minister of Health v. R., ex p. Yaffé (m)* a clearance scheme under section 40 of the Housing Act of 1925 was in question and the landlord was the party aggrieved. The Court of Appeal held the scheme invalid and Scrutton, L.J., thought the landlord was entitled to a writ of prohibition remarking, "The present Act enables a Minister to take away the property of individuals without compensation on certain defined conditions." The Court of Appeal was overruled by the House of Lords which held that the scheme as modified was *intra vires* but said that had it been *ultra vires* the order for confirmation by the Minister would not have saved it. The case is important as an instance of the phrase "as if enacted in this Act" (as to which see *infra* p. 281) and for its effect on the decision in *Lockwood's Case*. (See especially Lord Dunedin [1931] A. C. at p. 503). The consequences of the decision in *Yaffé's Case* (in the Court of Appeal) may be seen reflected in the provisions of section 11 of the Housing Act, 1930, substantially re-enacted in the Housing Act, 1936, second schedule.

Acute controversy in legal circles was aroused by Regulation 14B under the Defence of the Realm Act, 1914 which allowed the Government to detain (without trial) a person of alleged "hostile origin or associations." In *R. v. Halliday (n)* the regulation was held to be valid as a necessary security measure in wartime but Lord Shaw violently dissented "in which the principles of the liberty of the subject were forcibly asserted and an impressive warning was uttered concerning the extension of executive action." In *Liversidge v. Anderson (o)* the appellant was detained under Regulation 18B of the Defence (General) Regulations, 1939, the material words of which are "if the Secretary of State has reasonable cause to believe any person to be of hostile origin or association and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained." The critical words of the regulation are "has reasonable cause to believe" and the question in the House of Lords was whether the Secretary of State, when challenged, should have to prove the reasonableness of his belief, an objective view or whether it was sufficient for the Secretary of State to declare that he had such belief, a subjective test. "In the latter case it is for the Secretary of State alone to decide in the forum of his conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that those facts and circumstances constituted

(*l*) *R. v. Minister of Health, ex p. Davis*, [1929] 1 K. B. 619.

(*m*) [1930] 2 K. B. 98, 145; reversed, [1931] A. C. 494.

(*n*) [1917] A. C. 260, 285, Allen, *op. cit.*, 37.

(*o*) [1942] A. C. 206, *Thorneloe & Clarkson v. Board of Trade* (1950), 66 T. L. R. (Pt. 1) 1117, 1120. But compare *Thompson v. Farrer* (1882), 9 Q. B. D. 372, in the Court of Appeal on ss. 6 & 10 of the Merchant Shipping Act, 1876. The case is irreconcilable with *Liversidge v. Anderson* where it was apparently not cited.

a reasonable cause of belief." (Lord Macmillan at p. 248). In spite of strong dissent by Lord Atkin in favour of the objective view the subjective as described by Lord Macmillan was adopted by the majority.

"As if enacted in this Act." Some statutes provide that the orders or regulations made thereunder are to have the same effect "as if enacted by this Act". The formula appears to be ancient and its object was to emphasize the fact that both ordinances and proclamations were to be as effective as the statute would have been in the case of the Statute of the Staple in 1385. "Any suggestion that in either case Parliament was intending to provide that the validity of the Ordinances and Proclamations should not be canvassed in the Courts seems by its mere absurdity to answer itself" (p). Yet this is not only the suggestion but maybe the law nowadays: the actual position is uncertain but there is no doubt that the full effect of Lord Herschell's opinion in *Lockwood's Case* (*infra*) has been undermined. It is however clear that these words have only in recent times attracted judicial attention. The argument is that as the validity of a statute is outside the cognisance of the Courts of this country, rules and orders which are to have validity "as if enacted in this Act" are equally protected from judicial examination. Before citing the leading case on the subject, it may be noted that in *Baker v. Williams* (q) bylaws made under an Order in Council in pursuance of the Contagious Diseases (Animals) Act, 1898, were in question. The order was to have the same effect as if enacted in the Act itself. The matter was seriously considered in *Institute of Patent Agents v. Lockwood* (r). Under the Patents, Designs, and Trade Marks Acts of 1883 and 1888, the Board of Trade was authorised to make such rules as it considered necessary for carrying into effect the provisions of the Act of 1888, with regard to the registration of Patent Agents. Any rules so made were to be laid before Parliament and to be subject to a resolution for annulment within forty days. By section 101 (3) of the Act of 1883 the rules made thereunder "shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act." By one of these rules every registered patent agent was required to pay an annual registration fee on pain of removal from the register. Lockwood refused to pay and was removed from the register but continued thereafter to practice as a patent agent. Under the Act of 1883 it was an offence, punishable on summary conviction for any person knowingly "to describe himself as a patent agent in contravention of the section." In spite of this the Institute of Patent Agents raised an action against Lockwood in the Scottish Courts for an interdict to restrain him from describing himself as a patent agent. The Lord Ordinary granted this, but the Inner House reversed this

(p) Sir W. Graham-Harrison, Notes on Delegated Legislation, p. 66.

(q) [1898] 1 Q. B. 23, 25.

(r) [1894] A. C. 347. See the detailed examination of this case by Sir W. Graham-Harrison, *op. cit.*, pp. 26-72.

decision holding the rule *ultra vires*. Appeal was taken to the House of Lords where the only really relevant decision was that the action was misconceived and that the proper remedy was to prosecute Lockwood. Anything else was strictly speaking *obiter* but Lord Herschell spoke at length on the subject of the words "as if enacted in this Act" and was of opinion that the effect of these words was to make the "subordinate legislation as completely exempt from judicial review as the statute itself" (s). The other learned Lords concurred although none of them examined the question as thoroughly as Lord Herschell. *Lockwood's Case* was considered and distinguished in *R. v. Minister of Health, ex p. Yaffé* (see *supra* p. 280) (t). As the House of Lords held the scheme in *Yaffé's Case* to be a valid scheme under the Housing Act, 1925, the question of *vires* was probably irrelevant: nevertheless Lord Dunedin gave cogent reasons against accepting Lord Herschell's opinion. He said: (at p. 503): "The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, *per se*, embodied in a subsequent Act, for then the maxim to be applied would have been '*Posteriora derogant prioribus*.' But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in *certiorari*." This seems to indicate a disinclination to accept Lord Herschell's opinion at least to its fullest extent, though it is again open to the objection that Lord Dunedin's remarks were *obiter* as the question of *vires* was not relevant in *Yaffé's Case*.

The learned Lord distinguished *Lockwood's Case* by saying that in the latter Parliament was in control of the rules for forty days after they were passed and could have annulled them on motion to that effect, whereas in *Yaffé's Case* there was no parliamentary manner of dealing with the confirmations of the scheme by the Ministry of Health. Lord Warrington of Clyffe thought *Lockwood's Case* no obstacle because the rules must have been made in pursuance of the sections of the Act and you can canvass a rule (u).

The conflict between these two learned theories might have occurred in the very complicated recent case of *Miller v. Borthman* (x) which turned upon regulations containing the words "as if enacted in this Act" under the Factories Acts of 1901 and 1937. There appeared to

(s) Allen, *op. cit.*, p. 139. See his criticism of the phrase pp. 137-141.

(t) [1931] A. C. 494. Halsbury, *Laws of England* (2nd ed.) vol. 31, section 575, citing this case says: "The Court is not precluded from enquiring into the validity of an order because the statute authorising the making of the order provides that it shall have effect as if it were enacted in the statute."

(u) [1931] A. C. 494, 502, 515.

(x) [1944] K. B. 337.

be a repugnancy in which case the question might be whether certain of the regulations, having on the Herschell theory the force of statute, would enable a later section to prevail over an earlier or whether, if certain regulations were only of force if not inconsistent with the general intendment of the Act, they should on Lord Dunedin's principle yield to the earlier section. This conflict did not occur owing to the fact that power was reserved to the Secretary of State to modify or extend by special regulations some of the provisions of the Act of 1937. This is an instance, rather rare, of a regulation overriding a statutory provision.

It appears then that the effect of the words "as if enacted in this Act" still remains undecided and awaits an authoritative decision. Sir W. Graham-Harrison has exhaustively reviewed both *Lockwood's Case* and the relevant cases in which it has been cited or dealt with judicially. His own opinion is that "these words are merely a survival, a common form, which may originally have served a useful purpose, but which, in view of the decisions of the Courts, has long ceased to serve any purpose at all." (y).

Conclusive evidence clause. Sometimes judicial examination of a regulation is expressly excluded. In *Ex p. Ringer* (z) it appeared that an order made under section 39 of the Small Holdings and Allotments Act, 1908, for the acquisition of land was, when confirmed by the Board of Agriculture and Fisheries, to be final and not subject to review by the Courts. The confirmation was to be conclusive evidence that the requirements of the Act had been complied with and that the order was duly made and within the powers of the Act. The Act of 1908 also contained the clause "as if enacted in the Act" discussed above. The conclusive evidence clause seems to have fallen into disfavour though it appears in section 10 of the London Traffic Act, 1924, and it might be contended that the clause, drastic as it seems, falls within Lord Dunedin's opinion (see p. 282 *ante*). The clause also appears in the Housing, Town Planning etc., Act, 1909 (a), the Education Act, 1918 (b), the Housing Act, 1925 (c). The introduction of the clause into the Agricultural Marketing Act, 1931, was so strongly opposed that it was modified by providing that any scheme should not come into effect till approved by Parliament (d). So in *Wilkinson v. Barking Corporation* (e), under the Local Government Superannuation Act, 1937, s. 8 (1) (a) the local authority was to decide questions of compensation subject to appeal to the Minister "whose decision shall be final." As Scott, L.J., observed the local authority was "made a judge in its own cause."

(y) *Op. cit.* p. 66.

(z) (1909) 25 T. L. R. 718. Cf. *Damodhar Gordhan v. Deoram Kanji* (1875), 1 App. Cas. 332.

(a) First Schedule, cl. 2.

(b) S. 34 (1).

(c) Third Schedule, cl. 2.

(d) Agricultural Marketing Act, 1931, s. 1. (8).

(e) [1948] 1 A. E. R. 564, 569.

Repeal or amendment of statutes by orders in Council. This happens occasionally. Thus, the National Health Service Act, 1946, s. 67 (1) (b) enables regulations to be made modifying or extending the provisions of the Local Government Superannuation Act, 1937. This power has been exercised by the National Health Service (Superannuation) Regulations, 1950 (S.I. 1950 No. 497) paras. 48, 50, 53, 63. This feature of subordinate legislation is not new, see *e.g.*, the Local Government Acts, 1888, s. 108; 1894, s. 80 (1). In *Garnett v. Bradley* (f) it was held that the provisions of the statute of James (21 Jac. 1, c. 16) as to slander were repealed by the effect of R. S. C. Order LV, made under the authority of the Judicature Act, 1875. A recent instance is *Miller v. Boothman* (ante p. 282) (g). There the plaintiff was injured while working a circular saw. Regulation 10 of the Woodworking Machinery Regulations, 1922, made by the Minister under powers vested in him by the Factories Act, 1901, continued in force by section 159 of the Factories Act, 1937, although the Act of 1901 was repealed thereby. This Regulation prescribed the form of fencing required for circular saws. The Factories Act, 1937, s. 14 (1) enacts that all dangerous parts of machinery shall be securely fenced. The fencing installed by the defendants complied with the Regulation but did not comply with the statute. The Court of Appeal held that the Regulation by section 159 of the Factories Act, 1937, was to be deemed to be made under that Act and modified section 14 (1). The defendants had therefore not committed a breach of the statutory obligation.

Sub-Delegation. There are many examples of this in our statutes, especially the later ones. Up to recently the only relevant case appears to have been *R. v. Burah* (h) where the validity of a delegation to a Lieutenant-Governor of powers under an Act made by the Governor-General of India was in question. The Judicial Committee, without touching the question "whether the principle on which the judgment of the majority of the High Court was based (*i.e.*, that the Governor-General had no power to delegate) does or does not apply to delegated legislative powers," held the notification by the Lieutenant-Governor valid. The great objection to it is that "effective control of subordinate legislation is lost when the scope of authority passes from the delegate to the sub-delegate" (i). Sub-delegation may take one of two forms (i) The Minister may appoint himself the sub-delegate to alter a regulation made by himself. Section 32 (3) of the Interpretation Act provides that where an Act confers a power to make regulations it shall be construed as including a power to rescind, revoke or amend them. By Regulation 16 of 1921 under the Dangerous Drugs Act, 1920, the Minister took power to exempt any hospital or public institution from the operation of the departmental code. No such

(f) (1878) 3 App. Cas. 944, 964, 965.

(g) [1944] 1 K. B. 337.

(h) (1878), 3 A. C. 889; Cf. *Chittambaram v. R.*, [1947] A. C. 200. Sir W. Graham-Harrison, *op. cit.*, p. 110.

(i) Allen, *op. cit.*, p. 103.

power had been given or approved by Parliament. (ii) More usually, the Minister appoints a deputy to himself. This was common under the Defence Regulations. The Emergency Powers (Defence) Act, 1939, s. 1 (3) (k), provides "Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and byelaws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the Regulations." Very wide powers of sub-delegation are contained in Regulation 54 C (3) made under the Emergency Powers (Defence) Act, 1939. "A competent authority to such extent and subject to such restrictions as it thinks proper may delegate all or any of its functions under this Regulation to any specified persons or class of persons." Many other Regulations under this Act contain wide powers of sub-delegation (l).

Scott, L.J., has recently (m) pointed out some of the defects of this form of delegation:—(a) Its secrecy. "Safeguards are essential, especially that its content should always be within public knowledge . . . and where administration is mixed up with sub-delegated legislation and none of the mixture is made public, it is really unfair and indeed unjust to the public." (b) Its doubtful validity. "Some of the directions there contained (*i.e.* in circulars and notes to local authorities from the Minister of Health) are intended to have legislative effect although I accept the Attorney-General's contention that the regulation contained no such power of delegation. . . . The delegation to another Minister or to local authorities of powers of administration and discretion were not within the authority of the Minister of Works, *delegatus non potest delegare*, but the intention to delegate power and discretion to local authorities is clear." . . . The gravamen of these criticisms is that when, especially in times of crisis, the government has to seek a solution of its difficulties in an elaborate system of delegated and sub-delegated legislation, it is essential that there should always be publicity." The well-known principle *delegatus non potest delegare* has recently been applied to sub-delegation. In *Allingham v. Minister of Agriculture and Fisheries* (n), an agricultural committee delegated under Regulation 66 of the Defence (General) Regulations, 1939, and Regulation 62 (f) of the same, decided that eight acres of

(k) Cf. also the powers taken in the Emergency Powers Act, 1920, s. 2 (1).

(l) A question of sub-delegation by the Minister under Regulation 51 (5) of the Defence Regulations, 1939 was recently raised in *Blackpool Corporation v. Locker*, [1948] K. B. 349, where the requisition of a dwelling-house was held invalid. Cf. *Lewisham Borough Council v. Roberts*, [1949] 2 K. B. 608 and Emergency Powers (Defence) Act, 1939, section 7.

(m) *Jackson, Stanfield & Son v. Butterworth*, [1948] 2 A. E. R. 558, 564, 565. In view of the wide-spread complaints of the want of publicity of Ministerial decisions it is only fair to refer to the fact that selected decisions of the Minister of Town and Country Planning are published from time to time. These are collected in the *Encyclopædia of Planning, Compulsory Purchase and Compensation*.

(n) [1948] 1 A. E. R. 780.

sugar beet should be grown in a certain area but left to its executive officer the selection of the field which was required by the Regulation to be specified in the notice to the occupier of the field selected. The executive officer consulted a local sub-committee and served a notice specifying the field to be cultivated. The Divisional Court held the notice to be ineffective. The committee could not delegate its power to determine the land to be cultivated.

In *Blackpool Corporation v. Locker* (o) the Minister had sub-delegated his power of requisitioning dwelling-houses to the local council. Lord Justice Scott observed on the importance and desirability of facilitating the ascertainment by the private citizen of the manner in which his rights are affected by sub-delegated legislation. He added : "The Rules Publication Act and the Statutory Instruments Act have the grave defect of not being applicable to anything but primary delegated legislation. The public knows nothing of sub-delegated legislation."

Appellate power of Minister and Tribunals. Under the Housing and Town Planning Act, 1909, s. 17 the Local Government Board was substituted for Quarter Sessions and took over jurisdiction as to penalties imposed and closure orders made by local authorities. On this section the important case of *Local Government Board v. Arlidge* (p), was based. An owner of condemned house property alleged that he had been denied justice by the Board in that he had not been informed of the personnel of the appellate authority, the Local Government Board, to which his appeal lay: he had not been allowed to appear and state his case orally before the appellate authority and he had not been allowed to see the inspector's report. The House of Lords decided against him on all these points. The question, really unresolved, was how far the Local Government Board in this jurisdiction was an administrative and how far a judicial body (q). In *Errington v. Minister of Health* (r) the Court of Appeal decided that if an objection is raised before the Minister by parties to a clearance order, the Minister exercises quasi judicial functions and must act according to the rules of "natural justice" in coming to a decision and give all parties an opportunity of being heard and of dealing with the evidence. He must not act on *ex parte* statements. If the Minister or a tribunal acts judicially they must apparently act in accordance with the rules of "natural justice." It was . . . "of the highest importance that, where a quasi-judicial function is being exercised . . .

(o) [1948] K. B. 349, 362, 369. Since the Lord Justice spoke this has been partially remedied. See now Statutory Instruments, 1948 No. 2, set out at p. 276 *ante*.

(p) [1915] A. C. 120 and p. 138, Lord Shaw. Cf. *Board of Education v. Rice* [1911] A. C. 179; *Denby v. Minister of Health*, [1936] 1 K. B. 337.

(q) Cf. *Miller v. Minister of Health*, [1946] K. B. 626; *Franklin v. Minister of Town and Country Planning*, [1948] A. C. 87; *Robinson v. Minister of Town and Country Planning*, [1947] K. B. 702; *Johnson & Co. v. Minister of Health*, [1947] 2 A. E. R. 395; *Jobbins v. Middlesex County Council*, [1949] 1 K. B. 142.

(r) [1935] 1 K. B. 249, contrast *Horn v. Minister of Health*, [1937] 1 K. B. 164.

as here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair had been done . . . and that *ex parte* statements have not been heard before the decision has been given, without any chance for the persons concerned to refute those statements" (s). "Natural Justice" requires that (a) there shall be no bias; (b) no party shall be condemned unheard; (c) the party concerned shall know the reason for the decision, and (d) an inspector's report should be available (t).

Under the Road Act, 1920, s. 14 (3) an appeal was given to the Minister of Transport whose order was final and not subject to appeal. Under section 229 of the Local Government Act, 1933, and section 2 of the Audit (Local Authorities) Act, 1927, an appeal is given either to the High Court or to the Minister if the amount in question (disallowance or surcharge) does not exceed £500. If over that amount the appeal is to the Court. There are numerous appellate Tribunals set up by the various Government departments, *e.g.*, appeals under the Widows, Orphans and Old Age Contributory Pensions Act, 1936, s. 30; appeals also to referees appointed by the Minister under the National Health Insurance Act, 1936, s. 63, under the Unemployment Insurance Act, 1935, s. 43 (6); the Road and Rail Traffic Act, 1933, establishes an appellate tribunal to hear appeals from the refusal or variation of a licence: its decisions are final. A similar tribunal is set up under the Unemployment Act, 1934, s. 39. The Pensions Appeal Tribunal Act, 1943, sets up a tribunal to hear appeals from the decisions of the Minister with a further appeal on points of law to a specially appointed High Court Judge (t).

The publication of statutory rules and orders and statutory instruments. Statutory rules should not take effect unless they have been made and published as directed by the statute which authorises them, but it may be a question whether the direction to lay the rules before Parliament is mandatory or merely directory. Is laying a condition precedent to their operation or may it be neglected without prejudice to the effect of the rules? Each case must depend on its own circumstances or the wording of the statute under which the rules are made. For instance in *Dale's Case* (a), rules made under the Public Worship Regulation Act, 1874, s. 19, were in question and Brett, L.J., said: "I am of opinion that the rules and orders have statutory authority for not only is the authority given to certain persons to draw them up but it is provided that they shall be laid before Parliament for a certain time and if not objected to they are then to be binding." In *Bailey v. Williamson* (b) section 9 of the Parks Regulations Act,

(s) *Per Maugham, L.J.*, in *Errington v. Minister of Health*, [1935] 1 K. B. 249 at p. 297. Carr. Concerning English Administrative Law, 117, 120.

(t) 6 & 7 Geo. 6, c. 39, ss. 3, 4, 6.

(a) (1881) 6 Q. B. D. 376, 455. The case illustrates "an extreme instance of failure for defect of formal procedure," Allan *op. cit.*, p. 109n. Cf. Maxwell, 9th ed., p. 379.

(b) (1873) L. R. 8 Q. B. 118, 132, 133

1872, provided that any rules made thereunder should be laid before the Houses of Parliament if sitting and if not, within three weeks of the beginning of the next session and if any shall be disapproved by either House within one month of the laying, such rules or parts as have been disapproved shall not be enforced. The Act was passed in June, 1872, the rules were made in September, 1872, when Parliament was not sitting. In November the prisoner was convicted of contravening the rules. Quain, J., said that there were no negative words in section 9, and the *approval* of Parliament was not at all necessary. The Legislature must have intended that the rules should come into force as soon as they had been properly made and the power exercised after the passing of the Act under the 4th section and they should continue in force till either House of Parliament had expressed its disapproval of any rule or part of any rule, and then from that time that rule or that particular part of any rule should not be enforced. In *Storey v. Graham* (c), Channell, J., said “(It is said) that in order to comply with the provisions of section 101, subsection (4), of 46 & 47 Vict. c. 57, a copy of the rules of 1889 should also have been laid before both Houses of Parliament in order to make them valid. I somewhat doubt whether the provisions of section 101 are more than directory and whether it is necessary in any particular case where reliance is placed on such rules to prove that in fact its provisions had been complied with.” It would seem therefore that the better opinion is that directions for laying are only directory in spite of the fact that an Indemnity Act, 1944 (7 & 8 Geo. 6, c. 35), was considered necessary to absolve the forgetfulness of a Minister who had neglected to lay regulations (“as soon as may be”) specified in the Schedule to the Fire Services (Emergency Provisions) Act, 1941. Twenty-three sets of regulations (1941—1944) were concerned (d). Thus, an order which was to take effect on gazetting would not be enforced unless gazetting was proved; and rules directed to lie on the tables of the Houses for a given period are not enforced unless it appears that this provision was a condition subsequent or merely directory (e), and not a condition precedent to their taking effect (f).

The Universities (Scotland) Act, 1889, appointed a commission charged with the duty of improving the administration of the Scottish Universities. Section 20 declared that ordinances made by the commissioners should not be effective until, *inter alia*, laid before Parliament. The commissioners made an order purporting to be made

(c) [1899] 1 Q. B. 406, 412.

(d) It is difficult to see why an Indemnity Act was necessary. Cf. Allen, *op. cit.*, pp. 107–112.

(e) In *Jones v. Robson*, [1901] 1 K. B. 673, it was held that the giving and publication by a Secretary of State of a notice under s. 6 of the Coal Mines Regulation Act, 1896, was not a condition precedent to the validity of an order prohibiting the use of an explosive as dangerous, but directory only.

(f) The Prison Act, 1898, by s. 2, directs that prison rules “shall not be made until a draft has lain before each House for not less than thirty days during which the House is sitting.” Cf. p. 291, *infra*.

under the powers given by section 16 of the Act, and to affiliate University College, Dundee, to and make it form part of the University of St. Andrews. This order was not published or laid before Parliament or submitted to Her Majesty for approval. The validity of this order was challenged in *Metcalf v. Cox (g)* on the ground that the procedure prescribed by the statute had not been followed. In support of the validity of the order it was contended that the order was within the powers given by section 16, and that the provisions of section 20 as to ordinances did not govern orders made under section 16. The House of Lords held that the order was an ordinance; and that it appeared to be the general policy of the Legislature that all acts of the commissioners altering the constitution of a university, and necessarily affecting public or private interests or both, should be attended by the precautions and safeguards prescribed by section 20 of the statute, and that the ordinance was invalid for want of compliance with the prescribed procedure.

The Rules Publication Act, 1893, has been repealed by the Statutory Instruments Act, 1946. Regulations have also been made under that Act for carrying out its provisions which must now be shortly summarised. All statutory instruments are to be sent to the King's Printer and numbered in accordance with regulations under the Act; copies are to be printed and sold (*h*).

(a) *Publication, printing, numbering, etc.* (a) Every document of a legislative and not executive character made after the Act of 1946 by a rule-making authority as defined in the Rules Publication Act, 1893 (*i*), in exercise of a statutory power conferred on that authority by or under any Act of Parliament passed before the commencement of the Act of 1946 and (b) every other document which by any other enactment than the Act of 1893 would be subject to section 3 of that Act (printing, numbering and sale) if not repealed—are hereby declared to constitute a statutory rule (*k*). By section 3 of the Act of 1946 the Regulations are to provide for the publication by the Stationery Office of lists showing the date on which every statutory instrument printed and sold by the King's Printer was first issued, and in any legal proceedings a copy of any list so published, purporting to bear the imprint of the King's Printer, shall be received in evidence as a true copy, and an entry therein shall be conclusive evidence of the date on which any statutory instrument was first issued by the Stationery Office. The regulations provide for the numbering of statutory instruments and of their classification into local or general, with certain exemptions. The regulations also lay down that the Stationery Office shall from time to time publish a list called "Statutory Instruments Issue List" showing the statutory number and short title of each

(g) [1895] A. C. 328.

(h) Statutory Instruments Act, 1946 (9 & 10 Geo. 6, c. 36), s. 2.

(i) S. 4, "Every authority authorised to make statutory rules."

(k) Statutory Instruments Order—S.I. 1948, No. 1, Art. 2.

statutory instrument which has been issued for the first time by that Office during the period to which that list relates and date of its issue (*l*). A further regulation (*m*) provides that where a Minister exercises any power conferred on him by an Act passed before the Act of 1946 to confirm or approve any rules, regulations or other subordinate legislation made by an authority who is not a rule-making authority as defined in the Act of 1893 and the subordinate legislation in question is required to be laid before Parliament or the House of Commons, any document by which this power is exercised after January 1, 1948, shall be known as a statutory instrument and the provisions of the Act of 1946 shall apply to it. Article 2 of this regulation (*m*) refers to a schedule containing seven cases of the kind mentioned above and provides that confirmation of these orders, rules, schemes and bylaws if confirmed by the specified Minister after January 1, 1948, shall be known as a Statutory Instrument and the provisions of the Act of 1946 shall apply thereto.

The Act provides that it is to be a defence in proceedings for contravention of a statutory order to prove that it had not been issued by the Stationery Office at the date of the alleged contravention, unless it is proved that at that date reasonable steps had been taken to bring the instrument to the notice of the public or of persons likely to be affected by it or of the person charged (*n*). Further, there is to be an annual edition of these instruments including copies of all statutory instruments printed to date and an annual Numerical and Issue List of public statutory instruments showing their serial numbers and the date of those first issued by the Stationery Office with a classified list of local instruments, also tables showing their effect on statutes and previous statutory rules and an index (*o*). Every copy sold by the King's Printer shall bear on its face (*a*) a statement showing the date when the statutory instrument came or will come into operation; (*b*) a statement of the date when copies were laid or that copies are to be laid (see section 4 (1)) before Parliament (*p*).

(*b*) *Annulment*. Section 5 (1) of the Act of 1946 enacts that where by that Act or any subsequent Act it is provided that any statutory instrument shall be subject to annulment by resolution of either House of Parliament, the instrument shall be laid, and if either House within 40 days resolves on an address praying for annulment, no further proceedings shall be taken thereunder after the date of revocation; but the resolution and revocation are to be without prejudice to anything previously done under the instrument or to the making of a new statutory instrument. As to Acts passed before the date of the

(*l*) *Ibid.*, Art. 9.

(*m*) S.I. 1948, No. 2. This obviates the objection mentioned by Scott, L.J., in *Blackpool Corporation v. Locker*, [1948] K. B. 347, 362, 369.

(*n*) Statutory Instruments Act, 1946, s. 3 (2). Cf. *Johnson v. Sargant & Sons*, [1918] 1 K. B. 101.

(*o*) S.I. 1948, No. 1, Art. 10.

(*p*) Statutory Instruments Act, 1946, s. 4 (2).

1946 Act and containing provisions requiring that any Order in Council or other document shall be laid before Parliament after being made, and shall cease to be in force or may be annulled if within a specified period either House presents an address or passes a resolution to that effect, section 5 (2) enacts that subject to the provisions of any Order in Council made under the 1946 Act, any statutory instrument made in exercise of the said power shall by virtue of this Act be subject to annulment in pursuance of the resolution of either House and the provisions of subsection (1) (above) shall apply in substitution for any such provisions as aforesaid contained in the Act passed before the said date.

With regard to these provisions it will be observed that within the period of 40 days during which the statutory instruments lie action must be taken by negative resolution (see p. 277, *ante*) to annul the instrument. The section does not apply to instruments which are the subject of affirmative resolution and the Act does not contain any provisions relating to such: the reason being that instruments so subject are not effective unless rendered so by an affirmative resolution, while with regard to those subject to negative resolution, they become effective at the end of the 40 days unless a resolution is passed for their annulment. This uniform period of 40 days is adopted in place of the phrase "as soon as may be."

(c) *Draft Instruments*. In the case of a draft Order in Council, the draft shall not be submitted to His Majesty in Council or in any other case the instrument shall not be made, till the expiry of 40 days beginning from the date when a copy of the draft is laid before each House of Parliament, or if such copies are laid on different days from the later of the two days and if within that period the House resolves that the draft be not submitted to His Majesty or that the statutory instrument be not made, no further proceedings shall be taken thereon, without prejudice to the laying of a new draft (q).

With regard to provisions in Acts passed previous to the Act of 1946 requiring drafts to be laid before being submitted to His Majesty or before being made, they shall not be submitted or made, if within a specified period the House presents an address or passes a resolution to that effect, then, subject to the provisions of an Order in Council under the Act of 1946, a draft of any statutory instrument made in pursuance of the said power shall by this Act be laid before Parliament and the provisions of subsection (1) (above) shall apply in substitution for any such provision as aforesaid contained in the Act passed before that of 1946 (r). In calculating the 40 days referred to in the Act, no account is to be taken during which Parliament is dissolved or prorogued or adjourned for more than four days (s). The Treasury may make regulations for the purposes of the Act, but every statutory

(q) *Ibid.*, s. 6 (1).

(r) *Ibid.*, s. 6 (2).

(s) *Ibid.*, s. 7 (1).

instrument so made shall be subject to annulment in pursuance of a resolution of either House (t).

If a Minister with power to confirm or approve an order exercises this power in the case of making an order which is not a statutory rule within the Rules Publication Act, 1893, but it is expedient that the provisions of this Act should apply to it, His Majesty may by Order in Council direct that any document by which that power is exercised after a specified date shall be known as a statutory instrument and the provisions of the Act of 1946 shall apply (u). As to previous Acts, if it appears inexpedient that the provisions of those Acts should apply by reason of the exceptional nature of those provisions and that subsection (2) of section 5 (see p. 291, *ante*) or subsection (2) of section 6 (see p. 291, *ante*) would be inexpedient, His Majesty may direct that these provisions shall not apply to statutory instruments made under those provisions in previous Acts or shall apply subject to modifications. A draft of any such Order in Council is to be laid (x). For the purposes of the Act any powers to make, confirm or approve any orders, rules or regulations conferred on Government departments shall be deemed to be conferred on the Minister in charge (y).

(d) *Gazetting*. By section 12 (2) of the Act of 1946 publication in the London, Edinburgh or Belfast Gazette of a notice stating that a statutory instrument has been made and specifying the place where copies thereof can be purchased shall be sufficient compliance with the provisions of any enactment whether passed before or after the commencement of the Act of 1946, requiring the instrument to be published or notified in that Gazette.

The Act of 1946 to a great extent overcomes one of the objections to this class of legislation, *viz.*, its confusion and its obscurity not only to trained lawyers but to the ordinary man. The almost unlimited elasticity of this subordinate legislation make it extremely difficult to follow with its continuous and involved amendments (z). Dr. W. A. Robson after setting out what in his opinion are the advantages of administrative tribunals remarks that the disadvantages are (a) lack of publicity. This is no doubt largely cured by the Act of 1946 set out above. Also absence of reasons for the decisions arrived at. (b) The poor quality of the investigation into the facts; referring presumably to the perfunctory inquiries made by inspectors and other like officials. Lack of publicity may have been cured but none of the other objections have been provided for. It remains to be seen how far the provisions as to publicity provided by the Act solve any of these difficulties. If the ascertainment of primary delegated legislation is

(t) *Ibid.*, s. 8 (1).

(u) *Ibid.*, s. 9 (1).

(x) *Ibid.*, s. 9 (2).

(y) *Ibid.*, s. 11.

(z) See Allen, *op. cit.*, pp. 218—220. Robson, *Justice and Administrative Law* in 3rd ed. (1951), p. 573 *et seq.*

full of difficulty, how much more so is it in the case of sub-delegated legislation (a).

Rules made by Judges.

7. Rules made by the judiciary under statutory authority are subject to judicial examination in the same way and to the same extent as those made by the administrative or executive departments of State. In *King v. Henderson* (b), the Judicial Committee quashed as *ultra vires* a rule purporting to be made under the N. S. Wales Bankruptcy Acts of 1887 and 1888. Lord Watson said: "Now, the only power which the Court has to frame rules is conferred by section 119 of the principal Act (of 1887), and it is strictly limited to rules for 'the purpose of regulating any matter under this Act.' In the opinion of their Lordships, a rule empowering a Judge to make a declaration that no act of bankruptcy has been committed under the notice is in no sense a regulation either proved or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the Legislature withheld; it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice."

Judge-made Rules. The Rules of the Supreme Court take effect as part of the Judicature Acts (c). They have the effect of an Act of Parliament, but must be construed in accordance with the spirit of the Judicature Acts (d).

They cannot repeal or contradict express provisions in those Acts (e), but apparently may repeal any prior Act falling within the scope of the rule-making authority created by the Judicature Acts, it being presumed with reference to these rules that Parliament delegates its functions as to judicial procedure to a more competent authority.

Like rules made under other Acts, if they have a meaning and effect inconsistent with the Acts authorising them, they are, *pro tanto*, *ultra vires*. "If a rule," said Hannen, J., in *Irving v. Askew* (f), "were really repugnant to the provisions of the Act, I should think that the rule, though made under the powers of the Act, would not override

(a) See p. 285, *ante*, and the remarks of Scott, L.J., in *Blackpool Corpn. v. Locker*, [1948] K. B. 349, 362, 369. Now possibly partly remedied by S.I. 1948, No. 2, see p. 276, *ante*.

(b) [1898] A. C. 720, 729.

(c) Supreme Court of Judicature Act, 1875, s. 17; see Supreme Court of Judicature (Consolidation) Act, 1925, s. 99; *Garnett v. Bradley* (1878), 3 App. Cas. 944, 964, Lord Blackburn. (As far as slander is concerned the effect of Order LV is to repeal the statute 21 Jac. 1, c. 16.)

(d) *Schneider v. Batt* (1881), 8 Q. B. D. 701, 705, Bramwell, L.J.

(e) *Hartmont v. Foster* (1881), 8 Q. B. D. 82, 85, Cotton, L.J., 86, Lindley, L.J. (Order I, r. 2, does not contradict s. 49 of the Judicature Act, 1873); *W. T. Lamb & Sons v. Ryder*, [1948] 2 K. B. 331. (Order XLII, r. 23, does not conflict with s. 2 (4) Limitation Act, 1939.)

(f) (1869), L. R. 5 Q. B. 208, 211, a decision on the County Court Rules, 1867. See also *Re A Solicitor* (1890), 25 Q. B. D. 17, 23, Coleridge, C.J.; *Hacking v. Lee* (1860), 29 L. J. Q. B. 204, 206, Crompton, J.

its enactments." In *Ex p. Davis* (g), James, L.J., said (with reference to the Bankruptcy Rules, 1870): "The Act of Parliament is plain, the rule must be interpreted so as to be reconciled with it, or, if it cannot be reconciled, the rule must give way to the plain terms of the Act." The Common Law Procedure Act, 1852, s. 27, empowered a plaintiff to sign judgment against a defendant who did not appear. A question was raised (h), as to whether the Judges' Rule 174 intended to alter this statutory provision. It was held to have no such intention but to be merely explanatory of the proceeding under the Act. Parker, B., added that the Act was not affected by the supposed practice of the Court (to reckon Sunday as a *dies non*). And in *Richards v. Att.-Gen. of Jamaica* (i), the Court said with regard to certain rules which had been made under the Slave Trade Act, 1833: "It has been argued that these rules having been approved by the King in Council, have under the provisions of this statute the force of an Act of Parliament. . . . The words of these rules are no doubt very large, but, as they are made under the power of the Act and to provide for cases mentioned in the Act, we must look to the Act itself in order to construe them."

It is doubtful whether even the wide rule-making authority given by the Judicature Acts and the Supreme Court of Judicature (Consolidation) Act, 1925, permits the alteration of procedure so as to affect substantive rights (see *ante*, p. 293), although there is no vested right in procedure. (See *post*, p. 370.)

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 99 (1) (f) gives power to make rules for regulating and prescribing procedure and practice to be followed in the Court of Appeal or High Court in cases in which the procedure or practice is regulated by enactments in force immediately before the commencement of that Act or by any provisions of that Act re-enacting any such provisions. And by section 99 (1) (g) power is given to repeal by rules any enactments which relate to matters in respect to which rules are made under this section. A list of such enactments is set out in Schedule I of the Act.

The so-called Practice Rules made by the subordinate officers of the Supreme Court have slight, if any, independent validity except so far as they are adopted by the Judges as embodying the *cursus curiæ*, and even so cannot restrict the substantive provisions of an Act of Parliament or of a statutory rule (k). A practice rule "cannot in our judgment be treated as a direction of the Court under the Judicature Act, 1873, s. 22, and even if it could, it cannot contradict the Rules of Court of 1883, which have Parliamentary authority and are expressly made applicable to pending proceedings" (l). So also

(g) (1872), L. R. 7 Ch. App. 526, 529.

(h) *Rowberry v. Morgan* (1854), 9 Ex. 730, 737.

(i) (1848), 6 Moore P. C. 381, 398.

(k) *Harbottle v. Roberts*, [1905] 1 K. B. 572, 573, Collins, M.R.; *Victor v. Cropper* (1868), 3 T. L. R. 110.

(l) *Hume v. Somerton* (1890), 25 Q. B. D. 239, 243, Charles, J.

the Inland Revenue issues circulars of rulings and interpretations of the Finance Acts for the guidance of its officials.

In the case of inconsistency between earlier Acts and rules which have legislative authority, to the extent above stated the rules prevail (*m*). Many enactments have been expurgated from the Statute-book on this ground. But special enactments as to the incidence and amount of costs have in some cases been held not to be repealed by the general provisions of the Rules of the Supreme Court (*n*).

Where an Act passed subsequently to the making of rules is inconsistent with them, the Act must prevail unless it was so clearly passed *alio intuitu* that the two may be allowed to stand together (*o*).

County Court Rules. Similar principles of construction are applied to the County Court Rules, having regard always to the rule that the jurisdiction of the Superior Courts can only be ousted by specific words (*p*). "The question is 'what under such circumstances (action for £15; amount actually advanced on note and recovered £5) are the rights of the parties in respect of costs as between solicitor and client.' The answer to this question depends upon the construction of sections 118 and 119 of the County Courts Act, 1888, and the rules governing the scales of costs given in the Appendix to the County Court Rules, 1889. Those rules were made by a committee of County Court Judges, and allowed by the Lord Chancellor, under the authority conferred by section 164 of the Act, and they have, I assume, a statutory force. We must therefore construe the Act and rules together as one enactment, and we must endeavour to ascertain the meaning of each part of them from a consideration of the whole" (*q*).

Rules made by Courts under statutory or other authority are *ultra vires* and therefore invalid where they impose conditions not warranted by the statute (*r*).

Interpretation of Judge-made rules. Rules made by Judges, when equivalent to statutes, are to be construed in the same way. In *Danford v. McNulty* (*s*), Lord O'Hagan said: "We cannot act upon intention either in the case of a statute or in the case of a rule; we must have the intention carried into effect, and if the intention is stated to have been such that the terms either of the rule or of the statute contravene it, or are in any way inconsistent with it, we cannot have regard to that

(*m*) *Garnett v. Bradley* (1878), 3 App. Cas. 944, 950, cf. p. 293, *ante*.

(*n*) *Reeve v. Gibson*, [1891] 1 Q. B. 652.

(*o*) See *King v. Charing Cross Bank* (1890), 24 Q. B. D. 27, where it was held that the County Courts Act, 1888, s. 127, as to procedure in prohibition, was not inconsistent with R. S. C., 1883, Ord. XXIX, rr. 1, 8a. See chap. v, *post*.

(*p*) See p. 116, *ante*.

(*q*) *Re Langlois and Biden*, [1891] 1 Q. B. 349, 355, 357, Lord Esher, M.R.

(*r*) *R. v. Bird*, [1898] 2 Q. B. 340, as to rules made by Quarter Sessions under s. 43 of the Licensing Act, 1872, repealed and re-enacted as the Licensing (Consolidation) Act, 1910, s. 13 (4). Rules made by a Court of Quarter Sessions by virtue of the Common Law power of a Court to regulate its own procedure cannot override a statute: *R. v. Pawlett* (1873), L. R. 8 Q. B. 491.

(*s*) (1883), 8 App. Cas. 453, 460.

intention; we can only say, either in the case of the Judges or in the case of the Legislature, what the Judges or the Legislature have actually done." Lord O'Hagan went on to say that there was strong testimony as to the purpose for which the rule in question (R. S. C. 1875, Ord. XIX, r. 15, as to pleading in ejectment) was framed, which was put forward as being in a sense a contemporaneous exposition of the rule, and seemed to justify the inference of an agreement of the Judges on the point, but that even this agreement would not prevail if opposed to the express terms of the rule (i).

Where a question arose on R. S. C. 1883, Ord. L, r. 8, as to the meaning of the words "the amount of money in respect of which the lien or security is claimed," Lord Esher said (u): "Rule 8 of Order L. must be construed according to the ordinary meaning of the English language, unless there is something in the context which shows that it ought not to be so construed. The words have no idiomatic meaning, and they must therefore be construed according to their grammatical meaning."

Forms annexed to rules. Forms prescribed by rules of court are not construed as limiting or derogating from the rules or Act under which they are prescribed. They bear the same relation to rules as schedules do to Acts (x).

Bylaws.

8. *Bylaws.* Lord Russell of Killowen, C.J., gave this definition of a municipal bylaw—"an ordinance affecting the public or some portion of the public imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. Further, it involves this consequence, that if validly made it has the force of law within the sphere of its legitimate operation" (y). So the term bylaw, as now generally understood, applies to the local laws or regulations (z)

(i) *Re A Solicitor* (1890), 25 Q. B. D. 17, 26, Esher, M.R., "The form (of affidavit in schedule to Solicitors Act, 1888) does not derogate from the Act and Rules. I will go further and say that it was not in the power of the Judges to make a form which would so derogate and that any such form would be *ultra vires*." In *Hills v. Stanford* (1904), 23 N. Z. L. R. 1061, rules had been made under the authority of a statute for regulating practice and procedure, and were to have the same force and effect as if set out in the enacting part of the statute. It was held that the rules and forms might be looked at and considered in interpreting an ambiguous provision in the statute, and that in interpreting the statute the Court might take into account that the practice prescribed by the rules had been followed for a number of years. Cf. *Golding v. Eyre-Kenny* (1905), 25 N. Z. L. R. 897, 898; *Friedlander Bros. v. Miller* (1908), 28 N. Z. L. R. 97, 99; *Barrand & Abraham v. Fitzherbert* (1915), 34 N. Z. L. R. 1098, 1101; *Tipene v. Tutua Teone*. [1937] N. Z. L. R. 1098.

(u) *Gebruder Naf v. Ploton* (1890), 25 Q. B. D. 13, 15.

(x) See p. 208, *ante*.

(y) *Kruse v. Johnson*, [1898] 2 Q. B. 91, at p. 94; cf. *Williams v. Weston-super-Mare U. D. C.* (1908), 98 L. T. 537, 539, Channell, J.; Lumley's *Public Health*, 11th ed., vol. 1, pp. 1093, 1103, 1111-1113.

(z) As to the difference between bylaws made under an Act and rules or regulations made under an Act, see Schofield, *Bylaws of Local Authorities* (1939), pp. 13-15. In s. 188 of the Public Health Act, 1875, "a distinction is drawn between

made by public bodies of a municipal kind, or concerned with local government, or by corporations (a), or societies formed for commercial or other purposes, including gas, water, and railway companies, trade unions and friendly, industrial and building societies (b). Certain of these bodies, when constituted by charter (c), have certain common law powers as to making bylaws; but here it is proposed to deal only with those made under statutory authority.

Ultra vires. A bylaw unlike a statute may be treated by the Courts as *ultra vires* and unenforceable. That is to say, if a power exists by statute, charter, or custom to make bylaws, that power must be exercised strictly in accordance with the provisions of the statute, charter or custom which confers the power. Thus, in *Brown v. Holyhead Local Board* (d), it appeared that the local board was authorised (e) to make bylaws with respect, among other things, "to the level, width and construction of new streets." The Board made a bylaw empowering them "to cause any works in new or existing buildings," of which they did not approve, "to be pulled down or otherwise dealt with as the case may require." "We are all of opinion," said Pollock, C.B., "that the bylaw is not valid, as it is not in pursuance of the authority." So in *William Bean & Sons v. Flaxton R. D. C.* (f), a committee of the Council had agreed with the plaintiff, who had erected buildings which failed to comply with the Council's bylaws, to overlook certain deficiencies and to recommend the Minister to approve the building scheme. It was held that the agreement was invalid as one which the Council itself had no power to make and the Minister of Health had no power to relax the Council's bylaws in the case of a private building scheme. But a bylaw is not held *ultra vires* merely because it interferes with private property, nor because it prohibits where empowered to regulate, as regulation often involves prohibition (g). Where the statute gave no specific power to impose charges for user of a landing stage, and the bylaw provided that persons should be allowed to land "who have previously paid" a certain fee, a majority

regulations which sanitary authorities may make and bylaws, but the distinction is only made for the purposes of the Act": Lumley on Bylaws, p. 3. Cf. the Housing and Town Planning Act, 1909, ss. 16, 17 (7). In *De Morgan v. Metropolitan Board of Works* (1880), 5 Q. B. D. 155, 158, Lush, J., said that "bylaws are a code of restrictions," i.e., restrictions on the liberty of residents in the locality to which they apply.

(a) See Lumley's Public Health (11th ed.), vol. I, p. 1093.

(b) See *Re West Riding Permanent Benefit Building Society* (1890), 43 Ch. D. 407; *Tosh v. North British Building Society* (1886), 11 App. Cas. 489.

(c) The bulk of the original legislation of the American Colonies was effected by bylaws passed under the Colonial Charters: see Bk. II, chap. ix, "Colonial Legislation," *post*. The East India Company had similar powers under its charters, and the Regulating Act of 1773 (13 Geo. 3, c. 63) and some of its regulations were part of the law of British India up to recent times. See Ilbert, *Government of India* (2nd ed.), 41, 44, 58.

(d) (1862), 32 L. J. Ex. 25.

(e) By 21 & 22 Vict. c. 98, s. 29; repealed, but re-enacted as s. 157 of the Public Health Act, 1875.

(f) [1929] 1 K. B. 450.

(g) *Slattery v. Naylor* (1888), 13 App. Cas. 446, 450.

of the Divisional Court held the bylaw valid, as it was to operate only so long as the corporation might have power *aliunde* to impose the charge. The bylaw was not *ultra vires* and not in restraint of trade. The decision is perhaps doubtful (*h*). A distinction is usually drawn between the prohibition or prevention of a trade by a municipal bylaw and its regulation or governance, and indeed a power to regulate or govern ordinarily would seem to imply the continued existence of that which is regulated or governed, and to be inconsistent with absolute prohibition (*i*).

There are five main grounds on which the bylaws may be treated as *ultra vires*—

- (a) That they are not made, sanctioned and published in the manner prescribed by the statute which authorises the making of them.
- (b) That they are repugnant to the laws of England.
- (c) That they are repugnant to the statute under which they are made.
- (d) That they are uncertain.
- (e) That they are unreasonable.

(a) *Conformity to prescribed form.* Courts do not take judicial notice of bylaws, and require proof that the alleged bylaws have been made, and that all necessary sanctions have been obtained and all steps taken to bring them into operation. The mode of proof of bylaws depends usually upon the terms of the statute under which they are made. Section 1 of the Evidence Act, 1845, regulates the proof of most classes of bylaws. Bylaws of a local authority are proved under section 252 of the Local Government Act, 1933. Prints of bylaws are not admissible as evidence unless they bear the prescribed certificate purporting to be signed by the clerk of the authority stating (i) that the bylaw was made by the authority (ii) that the copy produced is a true copy of the bylaw; (iii) that on a specified date the bylaw was confirmed by the authority named in the certificate or, as the case may require, was sent to the Secretary of State and has not been disallowed (*k*); (iv) the date, if any, fixed by the confirming authority for the coming into force of the bylaw. If these requisites are complied with they furnish *prima facie* evidence of the facts stated in the certificate, without proof of the handwriting or official position of any person purporting to sign the certificate in pursuance of section 252 of the Local Government Act, 1933. The new features in the Act of 1933 are (1) the copy must be printed and (2) need not have a common or corporate seal attached.

(*h*) *Everton v. Walker* (1927), 137 L. T. 594.

(*i*) *Municipal Council of Toronto v. Virgo*, [1896] A. C. 88; cf. *Scott v. Glasgow Corporation*, [1899] A. C. 470. *Parker v. Bournemouth Corpn.* (1902), 86 L. T. 449; *Sydney Municipal Council v. Australian Freezing Works*, [1905] A. C. 161.

(*k*) Cf. *Municipal Corporations Act*, 1882, s. 23 and *Local Government Act*, 1888, s. 4 and *Drew v. Harlow* (1875), 39 J. P. 420; *Timothy v. Fenn* (1910), 74 J. P. 123.

Bylaws are usually revocable without reference to Parliament (*l*), and the Courts have in most, if not in all, cases the right to inquire and determine whether any particular rule, regulation, or bylaw is made in accordance with the statutory powers—whether as to the time when it is made, the form in which it is made, or its substantial contents. It has long been settled that the approval of a bylaw by the authorities mentioned in the statute under which it is made does not give it validity, if it is in other respects not in accordance with the statutory power (*m*). When the prescribed mode has been followed the bylaws are duly made so far as form is concerned; but it does not follow that their contents are authorised by the statute.

(b) *Repugnancy to general law.* A bylaw to be valid, says Sir John Comyns (*n*), must, be *legi fidei rationi consona*. This is in accordance with the proposition stated in 5 Co. Rep. 63 a, namely, that “all bylaws are allowed by the law which are made for the true and due execution of the laws or statutes of the realm, or for the well government and order of the body incorporate. And all bylaws which are contrary or repugnant to the laws or statutes of the realm are void and of no effect.” It is sometimes expressly stated in a statute that a bylaw must not be repugnant to the statute or the general law; but whether so stated or not a bylaw which in whole or in part is not confined to the particular circumstances contemplated by the statute or is repugnant to the general law is invalid. From this rule it follows, as was said by Lush, J., in *Hall v. Nixon* (*o*), “obedience to a bylaw cannot be enforced by the imprisonment of the offender or by the forfeiture of his goods, because these are both against Magna Charta” (*p*). It is necessary, however, to bear in mind the distinction between (1) bylaws made by corporations existing under charter (*q*), (2) regulations made by courts baron or court leet (*r*), and (3) bylaws purporting to be made in execution of statutory authority (*s*). Most of the older decisions relate to bylaws of the first two classes.

(*l*) See Interpretation Act, 1889, s. 32 (*3*).

(*m*) See *Ipswich Tailors' Case* (1614), 11 Co. Rep. 53; *Stationers' Co. v. Salisbury* (1693), Comb. 221, 222; *R. v. Wood* (1855), 5 E. & B. 49; *Kennaird v. Cory & Son*, [1898] 2 Q. B. 578; *Slattery v. Naylor* (1888), 13 App. Cas. 446. In New Zealand the Courts deal more freely with municipal bylaws than is now done in England, because in the Dominion they are not subject to the checks and safeguards imposed by English statute law: see *Grater v. Montague* (1903), 23 N. Z. L. R. 904. *Waldegrave v. Mayor, etc., of Palmerston North* (1909), 29 N. Z. L. R. 223, 225; *McCarthy v. Madden* (1914), 33 N. Z. L. R. 1251, 1267, 1273; *Broad v. R.* (1914), 33 N. Z. L. R. 1275, 1285. *Re A Waipu County Bylaw*, [1935] N. Z. L. R. 449, 462.

(*n*) Digest, tit. Bylaw, B. 1.

(*o*) (1875), L. R. 10 Q. B. 152, 159.

(*p*) Unless the statute giving power to make the bylaw incorporates the Summary Jurisdiction Acts, or otherwise gives power to imprison.

(*q*) See p. 302, *post*.

(*r*) These are bylaws whose validity depends on the Common Law rules as to the validity of local customs.

(*s*) See *Smith v. Butler* (1885), 16 Q. B. D. 349, where it was held that a borough corporation could make and enforce a bylaw under s. 48 of the Tramways Act, 1870, regulating the number of passengers to be carried on a tramcar, even without the assent of the lessee of the tram line—i.e., although the bylaw might interfere with the profits of the line.

In *Edmonds v. Waterman's Company* (t), the Court said that "a bylaw cannot be said to be inconsistent with the laws of this kingdom merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do, otherwise a nominal power of making bylaws would be utterly nugatory." And in *White v. Morley* (u), Channell, J., in speaking of a bylaw of the third class (*supra*), said: "A bylaw is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law, but it must not alter the general law by making that lawful which the general law makes unlawful, or that unlawful which the general law makes lawful" (x). And in *Gentel v. Rapps* (y) the same learned Judge said: "A bylaw is not repugnant to the general law merely because it creates a new offence and says that something shall be lawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land." The bylaw in question was to prohibit swearing or the use of offensive or obscene language in tramcars. The statutory power was to make bylaws to prevent nuisances. The bylaw was held valid although it did not contain such words as "so as to be a nuisance or any annoyance to others." Channell, J., held that the company had power to declare that particular things if capable of being nuisances are, when done in its district, nuisances. In *Powell v. May* (z), a county council bylaw prohibited the frequenting for the purpose of bookmaking any public place, that is "any open space to which the public have access for the time being." A bookmaker was convicted of bookmaking in a field, for admission to which the public were charged a fee. Racing had taken place there for fewer than the times specified in section 2 of the Betting and Lotteries Act, 1934. The conviction was held bad and the bylaw invalid as it prohibited the doing of an act which both the Street Betting Act of 1906 and the Betting and Lotteries Act, 1934 permitted subject to conditions which had been satisfied, *viz.*, notice had been given to the police that bookmaking would be allowed, and during the year bookmaking had not been carried on there for more than seven previous days.

Lord Goddard, C.J., said that the bylaw deprived the bookmaker of the defence under section 1 (4) of the Act of 1906, that no notice was exhibited forbidding bookmaking: it deprived him of the defence of showing that the ground was a racecourse and that racing took place on a day when he was betting and also deprived him of relying on

(t) (1855) 24 L. J. M. C. 124, 128.

(u) [1899] 1 Q. B. 34, 39.

(x) This decision was approved in *Thomas v. Sutters*, [1900] 1 Ch. 10.

(y) [1902] 1 K. B. 160, 165, 166; quoted with approval by Lord Hewart, C.J., in *L. M. S. Ry. v. Greaver*, [1937] 1 K. B. 367, 376.

(z) [1946] 1 K. B. 330, 335, 338.

section 2 (1) of the Act of 1934. The bylaw was repugnant to both Acts: "it is beyond the power of a county council to enact a bylaw which prohibits them (bookmakers) from doing what general statutes enable them to do." The learned Chief Justice had previously said: "There is no question that a bylaw which is repugnant to the general law is invalid, but it is not so easy to determine what is covered by the word 'repugnant' and in what circumstances a bylaw is to be held invalid on that ground. Obviously it cannot permit that which a statute expressly forbids, though it can of course forbid that which otherwise would be lawful at common law since otherwise no prohibitory bylaw could be valid."

(c) *Inconsistency with the statute under which they are made.* Bylaws made in pursuance of a statutory power must not go beyond, nor be repugnant to, the enactment under which they are made. In *Rossi v. Edinburgh Corporation* (a), the question was raised whether the civic authority had power to make regulations for the sale of ice cream in the form of a licence purporting to give effect to the Edinburgh Corporation Acts, 1900 (s. 80) and 1901 (s. 57). The statutes made a licence necessary for the sale of ice cream, but the licence issued limited the days and hours of sale. It was held that the licence as drawn was *ultra vires*. Lord Davey said: "Every restriction and every regulation such as I find in the Act of 1900, repeated in the Provisional Order of 1901, is of course *pro tanto* a restraint upon the ordinary right of every British subject. It is, in fact, a restraint of trade, and I am of opinion that although the Act and the Provisional Order in which I find such provisions ought to be construed fairly, and ought to be construed so as reasonably to effect the object which the Legislature may be presumed to have had in view, you ought not by implication to extend the restriction in respect of that particular trade further than the Legislature has sanctioned, and still less ought you to give such a construction to clauses of that description as would impose a restraint not only upon the exercise of the particular trade which is in question, but also upon the exercise of other trades which are not in question" (b). The order as drawn was therefore not a regulation but a prohibition and was to that extent invalid.

(d) *Bylaw must be certain.* A bylaw is liable to be declared void if it is not certain and positive in its terms, *i.e.*, if it does not contain adequate information as to what it requires or forbids to be done, so that the persons affected may be in no doubt as to what they are required to do or abstain from doing, and as to the penalty for non-compliance. In *Scott v. Pilliner* (c), a county council bylaw was held unreasonable

(a) [1905] A. C. 21, 27.

(b) Cf. *Spreadborough v. Walcot* (1904), Queensland State Rep. 104, where the Court asserted its power to inquire into the validity of bylaws made without statutory authority although they had been confirmed by the proper authority under the statute.

(c) [1904] 2 K. B. 855 (Divisional Court). Cf. Mathew, J., in *Kruse v. Johnson*, [1898] 2 Q. B. 91, at p. 108.

which sought to prohibit the sale or distribution in the streets or public places of papers devoted wholly or giving information as to the probable result of races, steeplechases, and other competitions, in other words, racing tips. The Court held the bylaw too wide and too uncertain, as reaching cases where the sale and distribution had nothing to do with betting or nuisance and were perfectly innocent (*d*).

(*e*) *Bylaw must be reasonable*. The power to quash as unreasonable bylaws made by corporations appears to have arisen, or to have been first authoritatively declared, by 15 Hen. 6, c. 6, revived and confirmed in 1503 by 19 Hen. 7, c. 7 (*e*). The Act is directed against masters, wardens and fellowships of crafts or mysteries (*i.e.*, mediæval trades unions), and rulers of guilds and fraternities, described in the preamble as private bodies corporate in cities, towns and boroughs. This power has been continuously exercised with reference to all bylaws for many centuries, and the Courts have been active to restrain the encroachments alike of the royal prerogative and local option upon the general law of the realm. And the jurisdiction of the High Court to decide upon the reasonableness of bylaws can be ousted only by express enactment (*f*). Lord Hobhouse, delivering the judgment of the Privy Council in *Slattery v. Naylor* (*g*), said, "The jurisdiction of testing bylaws by their reasonableness was originally applied to such cases as those of manorial bodies (*h*), towns or corporations having inherent powers or general powers conferred by charter in making such laws. As new corporations and administrative bodies have arisen, the same jurisdiction has been exercised over them." A distinction is now drawn between municipal bylaws and bylaws made by companies which carry on business for their own profit (*i*).

(*i*) *Local Government bylaws*. Section 249 of the Local Government Act, 1933, empowers the council of a county or borough to make bylaws for the good rule and government of the county or borough and for the prevention and suppression of nuisances therein. In general, bylaws made by a local authority, *i.e.*, by a county, borough, urban or rural district or rural parish, whether under the provisions of the Local Government Act, 1933, the Public Health Act, 1875, or section 26 of the Municipal Corporations Act, 1882, or any Act incorporating or applying those provisions or any Act passed after June 1, 1934, are made in accordance with the provisions of section 250 of the Local Government Act, 1933, and must be confirmed by the Home Secretary or the Minister of Health according to their subject-matter (*k*).

(*d*) See *Leyton U. D. C. v. Chew*, [1907] 2 K. B. 283; and *Local Government Encyclopædia*, tit. "Bylaws," vol. ii, p. 170.

(*e*) Unrepealed. See 1 Rev. Stat. (2nd ed.), p. 237.

(*f*) *Bentham v. Hoyle* (1878), 3 Q. B. D., 289, at p. 292, Cockburn, C.J.

(*g*) (1888), 13 App. Cas. 446, 452.

(*h*) Manorial bylaws rested on custom and could always be rejected as unreasonable.

(*i*) See p. 305, *post*.

(*k*) See generally Arnold's *Municipal Corporations* (1935), and Lumley's *Public Health* (11th ed.), vol. I, pp. 1093—1116.

The Courts are now averse from declaring bylaws of this kind bad on the ground of their being unreasonable. In *Slattery v. Naylor* (1), which turned on the validity of a bylaw made by a local authority in New South Wales for regulating interments in cemeteries, Lord Hobhouse said, "But in determining whether or no a bylaw is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned. . . . Every precaution has been taken by the Legislature to ensure: (1) That the council shall represent the feelings and interests of the community for which it makes laws. (2) That if it is mistaken, its composition may promptly be altered. (3) That its bylaws shall be under the control of the supreme executive authority. And (4) that ample opportunity shall be given to criticise them in either House of Parliament. Their lordships feel strong reluctance to question the reasonable character of bylaws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a court of law, unless it be in some very extreme case."

The views above expressed were applied in an English case, *Kruse v. Johnson* (m), where a question was raised as to the validity of a bylaw regulating street music made by a county council, purporting to act under section 16 of the Local Government Act, 1888. In that case Lord Russell of Killowen, C.J., after stating the definition of a local government bylaw quoted above (at p. 296), said: "When the Court is called upon to consider the bylaws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bylaws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently interpreted,' and credit ought to be given to those who have to administer them that they will be reasonably administered." But he said further (n), that there may be "cases in which it would be the duty of the Court to condemn bylaws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make

(1) (1888), 13 App. Cas. 446, at p. 453.

(m) [1898] 2 Q. B. 91, 98, 99. In that case most of the earlier authorities are collected; see also *Thomas v. Sutters*, [1900] 1 Ch. 10; *Mantle v. Jordan*, [1897] 1 Q. B. 248; cf. Peterson, J., in *Att.-Gen. v. Hodgson*, [1922] 2 Ch. 429, 438.

(n) The contrary view was well expressed by Mathew, J., in the same case at p. 108, and his views are supported by many prior decisions. He thought the bylaw in question was too absolute and unconditional in the powers it conferred and relied on *Alty v. Farrell*, [1896] 1 Q. B. 636 where the bylaw was held to be unreasonable as the power might be exercised oppressively.

such rules; they are unreasonable and *ultra vires*.' But it is in this and in this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded (o). A bylaw is not unreasonable merely because particular Judges may think that it goes farther than is prudent or necessary or convenient, or because it is not accompanied by an exception which some judges may think ought to be there" (p).

The decision in *Kruse v. Johnson* has been explained by Channell, J., in *White v. Morley* (q), by saying that when a thing is of such a character that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered a nuisance in the particular locality for which they have power to make bylaws. The Court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance, but cannot say whether it should or should not be forbidden in the particular locality. And in *Salt v. Scott Hall* (r) the same learned Judge said: "The Court does not now readily interfere to set aside as unreasonable and void bylaws which a local authority has deliberately adopted, for it recognises that the local authority is itself the best judge as to whether a particular bylaw is required in its district or not." The case of *Kruse v. Johnson* (*supra*, p. 303) again came under review by Channell, J., and the Court of Appeal in *Williams v. Weston-super-Mare U. D. C.* (s). The learned Judge said: "I wish to make it part of my judgment that I think the case of *Kruse v. Johnson* made a new departure in the construction of bylaws and draws a distinction between bylaws of a company or of a corporation and bylaws of a public body to whom large powers are entrusted. . . . What is established is that when power is conferred on a local authority to make a bylaw in reference to their own district *prima facie* the intention is to entrust to that authority all considerations as to whether particular things are desirable in that particular place, and whether the word 'nuisance' is used or not, they are to be the Judges of the propriety and desirability of these things in that place, because it is assumed that the local authority will know much better than the Legislature can the special requirements of that particular place."

(o) See generally article on bylaws in vol. ii, p. 170, of the *Encyclopædia of Local Government Law*.

(p) Lord Russell, C.J., also said that the decided cases show a wide diversity of judicial opinion, and no principle or definite standard of unreasonableness. The view of Cockburn, C.J., in *Bailey v. Williamson* (1872), L. R. 8 Q. B. 118, 124, that if a rule is made within the scope of the authority given the Courts cannot inquire into its reasonableness was not accepted in *Kruse v. Johnson* (see *ibid.* at p. 99) as absolutely excluding inquiry into reasonableness. "If the rule is made within the scope of the authority given by the Legislature, there is an end of the matter as far as we are concerned." But *Bailey v. Williamson* may perhaps be explained as applying to regulations made under statutes as distinct from what are usually and more accurately described as bylaws.

(q) [1899] 1 Q. B. 33, 39.

(r) [1903] 2 K. B. 245, 249.

(s) (1908), 98 L. T. 537, 539; (1910), 103 L. T. 9, 11, distinguishing *Parker v. Bournemouth Corp.* (1902), 86 L. T. 449 as being virtually a prohibition, whereas only regulation was authorised by the statute.

In the Court of Appeal where the decision that the bylaw was valid was affirmed, Cozens-Hardy, M.R., said: "*Kruse v. Johnson* is a clear and distinct authority that the Court ought not to be precluded in dealing with bylaws made by local bodies like this from finding any fault in them. But they ought to assume and assume strongly, that the local authority is exercising their duty honestly and doing their best for the benefit of the locality, they being entrusted by Parliament with powers for that express purpose."

When considering whether a bylaw is reasonable or not, the Courts need a strong case to be made out against it, and decline to determine whether it would have been wiser or more prudent to make the bylaw less absolute, nor will they hold that it is unreasonable because considerations which the Court would itself have regarded in framing such a bylaw have been overlooked or rejected by its framers (t).

The result of these decisions is to place bylaws for "good rule and government" made under the Municipal Corporations Act, 1882, or the Local Government Act, 1933; bylaws made under the Public Health Acts and under Acts as to streets and buildings (u); bylaws made by Conservators of Fisheries (x); and, presumably, bylaws made under statutory powers by any body of a public representative character in a somewhat different position from bylaws under most other statutes. A local authority, in making bylaws under the Public Health Acts, is entitled to look ahead and frame them so as to meet cases not within the present necessities of the neighbourhood (y). The Courts have not, however, wholly ceased to exercise their power of declaring such bylaws unreasonable.

(ii) *Bylaws of companies, societies, etc.* "The great majority of cases in which the question of bylaws has been discussed are not cases of bylaws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies (z), and other like companies carrying on business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage" (a).

There have been numerous decisions with reference to railway bylaws made under section 109 of the Railway Clauses Consolidation

(t) See *Slattery v. Naylor* (1888), 13 App. Cas. 446, 452. In *Heap v. Burnley Union* (1884), 12 Q. B. D. 617, 618, Coleridge, C.J., said: "It is impossible to attempt to lay down what, under all the circumstances, would be a reasonable bylaw, but it seems to me to be unreasonable to say that in country districts, in the present state of things, nobody shall keep a pig within fifty feet of his dwelling-house."

(u) *Simmons v. Mallory R. D. Co.*, [1897] 2 Q. B. 433.

(x) *Clayton v. Peirse*, [1904] 1 K. B. 424, 427. *Smith v. Great Yarmouth Port and Haven Commissioners* (1919), 88 L. J. K. B. 1190.

(y) *Att.-Gen. v. Gibb*, [1909] 2 Ch. 265.

(z) *Dick v. Badart* (1883), 10 Q. B. 387; *Londonderry Harbour Commissioners v. Londonderry Bridge Commissioners*, [1894] 2 Ir. Rep. 384.

(a) *Kruse v. Johnson*, [1898] 2 Q. B. 91, 99, Lord Russell of Killowen, C.J.

Act, 1845, which enacts that "For better enforcing all or any of such regulations (under section 108), it shall be lawful for the company, subject to the provisions of the Railway Regulation Act, 1840, to make bylaws, and from time to time to repeal and alter such bylaws and make others, provided that such bylaws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act."

In *Dearden v. Townsend* (b) it appeared that a railway company was authorised by its special Act to make bylaws in order to carry out the provisions of the Act. One of these provisions was that it was an offence for anyone to travel without having paid his fare "with intent to evade payment of it." The company made a bylaw that "any passenger not producing his ticket" when required to do so "will be required to pay the fare from the place whence the train originally started." A passenger, who had intended only to travel from a certain station and back, went farther, not "with intent to evade payment of his fare." The company, however, insisted that under their bylaw the passenger was bound to pay as from the starting station. But it was held otherwise. "The statute," said Cockburn, C.J., "expressly provides for the case of persons intending to evade the payment of their fares, making that fraudulent intention the gist and essential ingredient of the offence. Then section 109 authorises the company to make bylaws not repugnant to the provisions of the statute. Therefore, if the company thus alone authorised to make bylaws were by a bylaw to constitute the same facts an offence, striking out the ingredient of intention to defraud, they would be altering the enactment of the statute and legislating in a sense repugnant to its provisions" (c). By section 5 of the Regulation of Railways Act, 1889, the powers of railway companies with regard to failure to produce tickets, travelling without paying, going beyond destination on tickets, failing to pay and giving a false name and address were extended, but that statute does not in any way extend the powers of railway companies to frame bylaws imposing penalties with respect to tickets in the absence of any travel or attempt to travel without having previously paid the fare and with intent to avoid payment thereof (d). In *Browning v. Floyd* (e) s. 5 (3) of the Act of 1889, was in question. The defendant had attempted to travel on the unused half of a return ticket previously issued to his wife. It was held that intent to defraud was not a necessary ingredient to the offence. "The question is whether he intended to avoid paying the fare."

(b) (1865), L. R. 1 Q. B. 10, 13.

(c) See also *Hall v. Nixon* (1875), L. R. 10 Q. B. 152, 161, Quain, J.; *R. v. Lundie* (1861), 31 L. J. M. C. 157; *R. v. Saddlers' Company* (1863), 23 L. J. Q. B. 337, 345, Willes, J.; *Bentham v. Hoyle* (1878), 3 Q. B. D. 289; *L. B. & S. C. Ry. v. Watson* (1878), 3 C. P. D. 429; (1879), 4 C. P. D. 118; *Saunders v. S. E. Ry.* (1880), 5 Q. B. D. 456, 463, Cockburn, C.J.; *Dyson v. L. & N. W. Ry.* (1881), 7 Q. B. D. 32.

(d) *Huffam v. N. Staffordshire Ry.*, [1894] 2 Q. B. 821 (no intention to avoid payment).

(e) [1946] 1 K. B. 597, 601, Lord Goddard, C.J.

Bylaws made under the Tramways Act, 1870, appear not to be rendered invalid or unreasonable by omission to make intent to defraud (*f*) an ingredient in offences thereby created, or to include the words "so as to be a nuisance or annoyance to others" (*g*). But a bylaw providing that a passenger shall be guilty of an offence who leaves a tramcar without paying his fare, no fare having been demanded, is *ultra vires* as being against the general law and is also unreasonable (*h*).

(iii) *Rules of friendly, etc., societies*. In the case of societies formed and registered under Acts of Parliament, statutory provisions are usually made for the submission of their rules and bylaws to the registrar of friendly societies, or some other public officer or department, for sanction. Such rules differ from ordinary bylaws in being the basis of the terms of membership of a particular society, and not being a local law. They resemble the articles and regulations of a limited company as to its internal management, and may be treated as *ultra vires* on the same principle (*i*), *i.e.*, their validity or invalidity depends on observance of the statutory directions as to the mode of passing, registering and obtaining sanction, and on the question whether their contents are in accordance with the powers of internal legislation given by the statute. Thus a rule of a trade union providing for application of part of the members' contributions to pay members of Parliament pledged to the policy of the Labour Party has been held invalid (*k*). Such bylaws may also be unenforceable by reason of their being in unlawful restraint of trade (*l*).

Effect of repeal of Act under which bylaws are made. If the statute under which bylaws are made is repealed, those bylaws are impliedly repealed and cease to have any validity unless the repealing statute contains some provision preserving the validity of the bylaw notwithstanding the repeal (*m*). This follows from the rule stated below (*n*) that when an Act of Parliament is repealed it must be considered (except to transactions passed and closed) as if it had never existed. There is nothing in the Interpretation Act, 1889, to keep alive bylaws after the repeal of the statute under which they are made (*m*). The Municipal Corporations Act, 1882, whilst repealing a number of earlier Acts by section 260 (3) kept alive bylaws made under those repealed Acts.

(*f*) *Hanks v. Bridgman*, [1896] 1 Q. B. 253; *Lowe v. Volp*, [1896] 1 Q. B. 256.

(*g*) *Genet v. Rapps*, [1902] 1 K. B. 160.

(*h*) *L. P. T. B. v. Sumner* (1935), 52 T. L. R. 13.

(*i*) See *Murray v. Scott* (1884), 9 App. Cas. 519; *Re Sunderland 36th Universal Building Society* (1890), 24 Q. B. D. 394; *Sixth West Kent Mutual Building Society v. Shore*, [1892] 2 Ch. 64, n.; *Same v. Hills*, [1899] 2 Ch. 60; *Strohmenger v. Finsbury Permanent, etc., Building Society*, [1897] 2 Ch. 469.

(*k*) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87.

(*l*) *Swaine v. Wilson* (1890), 24 Q. B. D. 252; *Chamberlain's Wharf, Ltd. v. Smith*, [1900] 2 Ch. 605; *Howden v. Yorkshire Miners' Association*, [1903] 1 K. B. 308; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506.

(*m*) *Watson v. Winch*, [1916] 1 K. B. 688; *Bennett v. Tatton* (1918), 118 L. T. 788; *R. v. Ellis, Ex. p. Amalgamated Engineering Union*, (1921), 125 L. T. 397.

(*n*) See p. 380 *post*, and *Surtees v. Ellison* (1829), 9 B. & C. 750, 752, Lord Tenterden, C.J.

Severability of bylaws. There is some difference of judicial opinion as to whether a bylaw is severable or divisible. In *Clark v. Denton* (o), Bayley, J., said that a bylaw if severable can be good in part and bad in part (p); and in *Dyson v. L. & N. W. Ry.* (q), Lindley and Mathew, JJ., treated the bylaw there in question as severable. In *Saunders v. South Eastern Ry.* (r), Cockburn, C.J., said: "Not only is it essential to the validity of a bylaw that it be reasonable, but also that a bylaw being entire, if it be unreasonable in any particular, shall be void for the whole." But in *Strickland v. Hayes* (s), Lindley, L.J., said: "There is plenty of authority for saying that if a bylaw can be divided, one part may be rejected as bad while the rest may be held to be good" (t).

Enforcement of bylaws. The question sometimes arises whether bylaws imposing penalties are enforceable by private persons or only by the bylaw-making authority. This question must be answered in each case with regard to the terms and scope of the statute authorising the making and enforcement of the bylaws (u). Unless the express words or clear intent of the statute limit the right to prosecute, the ordinary rule applies that any person may take proceedings to recover a penalty for breach of the law (x). "When bylaws are contravened the remedies contained in them are not the only remedies available. The Court can enforce compliance with them by injunction in an action by the Attorney-General. In the case of a continuing offence this jurisdiction exists although the offender against the bylaw has been previously convicted and fined" (y).

(o) (1830), 1 B. & Ad. 92, 95.

(p) See *R. v. Mayor of Faversham* (1799), 8 T. R. 359.

(q) (1881), 7 Q. B. D. 32. Cf. *R. v. Lundie* (1861), 31 L. J. M. C. 157.

(r) (1880), 5 Q. B. D. 456, 463.

(s) [1896] 1 Q. B. 290, 292.

(t) This case has been doubted and distinguished on points not affecting the dictum above quoted: see *Burnett v. Berry*, [1896] 1 Q. B. 641; *Thomas v. Sutters*, [1900] 1 Ch. 10, 14, Lindley, L.J.; *Genel v. Rapps*, [1902] 1 K. B. 160, 163, Lord Alverstone, C.J.

(u) As to statutes, see *R. v. Cubitt* (1889), 22 Q. B. D. 622, on the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), ss. 4, 11; *R. v. Lovibond* (1871), 24 L. T. (N.S.) 357; *Herring v. Mayor, etc., of Stockton* (1877), 31 J. P. 420; *Atkinson v. Newcastle Waterworks* (1877), 2 Ex. D. 441, 448; *Phillips v. Britannia Hygienic Laundry Co., Ltd.*, [1923] 2 K. B. 832.

(x) *Wolverhampton New Waterworks v. Hawkesford* (1859), 6 C. B. (N.S.) 336, 356, Willes, J.; *R. v. Stewart*, [1896] 1 K. B. 300, 303; and see *Caswell v. Morgan* (1859), 28 L. J. M. C. 208; *Cole v. Coulton* (1860), 29 L. J. M. C. 125; *Back v. Holmes* (1888), 57 L. J. M. C. 37; *Walker v. Laxton* (1894), 70 L. T. (N.S.) 690.

(y) Lumley, Public Health, 11th ed., vol. iv, p. 4441. *Att.-Gen. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34.

CHAPTER IV

EFFECT OF STATUTES ON COMMON LAW AND EQUITY

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Present relations of common law and equity.

1. References to the common law in this chapter must be taken as also applying to equity, inasmuch as the fusion of the Courts of law and equity, and the provision that equity is to be administered in preference to law where their rules conflict (*a*), united common law and equity as two branches of the *lex non scripta*.

A statute may extend the common law to cases which it did not cover, or may restrict or exclude its operation as to cases which it did cover, or may merge it wholly in the statute law, *e.g.*, by codification.

Case-law and statute law. It is often important to ascertain whether a statute has altered the law. Thus, in *Moore v. Knight* (*b*), Stirling, J., had to determine whether the decision in *Blair v. Bromley* (*c*) was affected by section 8 of the Trustee Act, 1888, which extended the Statutes of Limitations to certain breaches of trust.

Where common law and a statute conflict, the latter prevails. Where there is a conflict case-law must of course yield to statute law. Many enactments are aimed at particular judicial decisions, either declaring them to have been erroneous or altering the law as laid down in them. And it is a matter of everyday occurrence for the Courts to consider whether the wording of an enactment shows an intent to get rid of some rule of case-law (*d*). So in *Barber v. Pigden* (*e*), Scott, L.J., holding

(*a*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 44.

(*b*) [1891] 1 Ch. 547.

(*c*) (1848) 2 Ph. 354; 5 Hare 542.

(*d*) *E.g.*, the Criminal Evidence Act, 1898; and see *Burge v. Ashley & Smith, Ltd.*, [1900] 1 Q. B. 744; *Steele v. M'Kinlay* (1880), 5 App. Cas. 754.

(*e*) [1937] 1 K. B. 664, at p. 677.

that sections 3 (b) and 4 (1) (b) of the Law Reform (Married Women and Tortfeasors) Act, 1935, were retrospective, thought the intention of the Legislature was to make “a clean sweep of the old common law fiction” of the merging of a married woman’s property in that of her husband, and in *Handley v. Handley (f)*, Lindley, L.J., said: Section 35 of the Matrimonial Causes Act, 1859, “enacts that the Court may make such provision as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of the suit. The language is express and unmistakable, and clearly gives to the Judge of the Divorce Court a wide discretion as to the custody of the children, though not a discretion which cannot be the subject of an appeal. This discretion, in my opinion, overrules both the common law rules and the Chancery rules as to the custody of children which were in force when the Act was passed. The Judge is not bound to follow any of these rules, though he will have regard to them in exercising his discretion; but he will be mainly guided by the particular circumstances of the case before him.”

“The common law has no controller in any part of it but the High Court of Parliament, and if it be not abrogated or altered by Parliament it remains still” (g). If it is clear that it was the intention of the Legislature in passing a new statute to abrogate the previous common law on the subject, the common law must give way and the statute must prevail (h); but there is no presumption that a statute is intended to override the common law. In fact the presumption, if any, is the other way for “the general rule in exposition is this, that in all doubtful matters, and where the expression is in general terms, the words are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare” (i). And if, as Coleridge, J., said in *R. v. Scott (k)*, there is “a seeming conflict between the common law and the provisions of a statute,” it is not right to begin “by assuming at once that there is a real conflict and sacrificing the common law”; we ought rather to proceed in the first place “by carefully examining whether the two may not be reconciled, and full effect given to both” (l). “It is a sound rule,” said Byles, J., in *R. v. Morris (m)* “to construe a statute in conformity with the common law rather than against it, except

(f) [1891] P. 124, 127.

(g) 1 Co. Inst. 115 b.

(h) The dictum of Coke that an Act of Parliament cannot overrule the principles of the common law is not now accepted. See Maine, *Hist. Early Inst.*, p. 381; Dicey, *Constitution*, 9th ed., 41, 61 n. 2; and as to colonial laws, the Colonial Laws Validity Act, 1865, in Part II, ch. ix, *post*.

(i) *Per cur. Arthur v. Bokenham* (1708), 11 Mod. 150; *Secretary of State for India v. Bank of India Ltd.* (1938), L. R. 65 I. A. 286, 298, *per* Lord Wright.

(k) (1856), 25 L. J. M. C. 128, 133.

(l) As to construction of a statute conferring a right, see *Morris & Bastert v. Loughborough Corporation*, [1908] 1 K. B. 205, and p. 255, *ante*.

(m) (1867), L. R. 1 C. C. R. 90, at p. 95, cited with approval by Slessor, L.J., in *Lord Eldon v. Hedley Bros.*, [1935] 2 K. B. 1, at p. 24.

where and so far as the statute is plainly intended to alter the course of the common law." 37 Hen. 8, c. 12, enacted that "the citizens and inhabitants of London should pay tithes yearly." In an action brought against the Dean of St. Paul's for non-payment of tithes, it was argued, that being an ecclesiastical person, he was exempt from paying tithes in accordance with the common law maxim, *Ecclesia ecclesiae decimasolvere non debet*. It was held, however, that as there was an express Act of Parliament charging every house generally in the parish, except certain houses which are expressly exempted . . . therefore, the Act of Parliament not having expressly discharged him, the Dean was liable . . . because the maxim was contravened by the express words of an Act of Parliament (n). In *Leach v. R. (o)*, the House of Lords refused to construe section 4 of the Criminal Evidence Act, 1898, as taking away the common law right of a wife to refuse to give evidence against her husband. Such a right could only be excluded by a definite and positive enactment to the contrary. As a general proposition of common law the sheriff is entitled to poundage on money obtained by the execution creditor by operation of law, whether by sale of the goods of the judgment debtor, or by being paid out. By section 46 (1) of the Bankruptcy Act, 1883, "the costs of the execution" are made a charge on any property delivered over to the Official Receiver in Bankruptcy under the section. In *Re Ludmore (p)*, Cave, J., held that the expression "costs of the execution" must be governed and construed by the general rule above stated, and that consequently the sheriff was not entitled to poundage unless he had sold the goods seized or had been paid out before the intervention of the Official Receiver.

Effect of statutes on prescription or custom. There is a very lengthy and learned discussion in Coke upon Littleton by Hargrave and Butler, 115a, note (15), ed. 1832, as to the effect of a statute upon a custom, leading to the conclusion that a statute which is in the affirmative does not take away a custom; but it seems doubtful whether even a statute expressed in negative language can do so if it is merely declaratory of the existing law (q).

In *New Windsor Corporation v. Taylor (r)*, Lord Halsbury, L.C., said: "It is therefore clear to my mind beyond question that the nature of the right (customary tolls) is completely altered by turning

(n) *Warden of St. Paul's v. Dean of St. Paul's* (1817), 4 Price 65.

(o) [1912] A. C. 305, 309, 311.

(p) (1884), 13 Q. B. D. 415, 417.

(q) As to this, see *Mayor of London v. Gatford* (1675), 2 Mod. 39; *R. v. Pugh* (1779), 1 Dougl. 188; and *R. v. Chart* (1870), L. R. 1 C. C. R. 237, 240, as to the effect of affirmative words in a statute upon a liability which has immemorially existed. A local custom cannot be set up against a statute; thus, a custom in Southampton that every pound of butter should weigh eighteen ounces was held bad, as being contrary to 14 Chas. 2, c. 26: *Noble v. Darell* (1789), 3 T. R. 271. See also *Truscott v. Merchant Taylors' Co.* (1856), 11 Ex. 855, 863. *R. v. Saltren* (1784), Cald. 444, the usage of a particular district cannot vary the general law. As to effect of usage in construction of statutes see p. 144, ante.

(r) [1899] A. C. 41, 45, 49.

it into a statutory right and that the right must continue—if it does continue—by virtue of the statute without any power of revival or reverter back to its original nature.” Lord Davey said: “I hold it to be an indisputable proposition of law that where an Act of Parliament has, according to its true construction, to use the language of Littledale, J. (s), ‘embraced and confirmed’ a right which had previously existed by custom or prescription, that right becomes thenceforward a statutory right, and that the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament.” This doctrine also applies to a franchise or charter created by a grant from the Crown. The result of the doctrine is that the repeal of the statute dealing with a right previously existing by custom, charter, prescription, or franchise does not revive the old right as it stood before the repealed statute was passed, unless an intention to do so is clearly indicated. If the statute which superseded the franchise was of a temporary character, it seems uncertain whether on the lapse of the statute the old right would revive (t). So an ancient franchise market was held in *Mayor of Manchester v. Lyons* to have been extinguished by a series of statutes creating a statutory market in its place (u).

Cases in which common law right of action is taken away by statute. “Some things,” said Lord Blackburn, “I think are no longer open to discussion. No action can be maintained for anything which is done under the authority of the Legislature, though the Act is one which, if unauthorised by the Legislature would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the Legislature has thought fit to give him (see *Hammersmith Ry. v. Brand* (1869), 4 H. L. 171). The Lands and Railways Clauses Act of 1845 gives some compensation. . . . And it must now be considered settled that on the construction of those Acts, compensation is confined to damage arising from that which would, if done without authority from the Legislature, have given rise to a cause of action” (x). In an earlier case the same learned Lord said: “Where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the Legislature, would give a right of action or suit to persons affected by the act or omission, the right of action is taken away. The Legislative has very often interfered with the rights of private persons but in modern times it has generally given compensation to those injured; and if no compensation is given, it affords a reason, though not an exclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it

(s) In the *Islington Market Bill* (1835), 3 Cl. & F. 513.

(t) *New Windsor Corporation v. Taylor*, *supra*; *Gwynne v. Drewitt*, [1894] 2 Ch. 616.

(u) (1882), 22 Ch. D. 287; see also *Abergavenny Improvement Commissioners v. Straker* (1889), 42 Ch. D. 83, 89.

(x) *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259, 293.

could be done, without injury to others. What was the intention of the Legislature in any particular Act is a question of the construction of the Act" (y). "When" as the Court said in *Vaughan v. Taff Vale Ry.* (z), "the Legislature has sanctioned and authorised the use of a particular thing and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it the consequence, that if damage results from the use of such thing independent of negligence the party using it is not responsible." In *R. v. Pease* (a) an action was brought against the Stockton and Darlington Railway by a person whose horse, while passing along a public road near the railway, had been frightened by the noise of the engines. The company had statutory powers, but the plaintiff contended that although the defendants had power to use locomotives, it did not follow that the common law rights of the public were taken away by their Act so as to prevent an action at common law for annoyance. But the Court held that when the Legislature gave to the defendants unqualified authority to use locomotives, they must be presumed to have known that the railway would be adjacent to the public highway, and that the public which use the highway would sustain some inconvenience, which inconvenience there was nothing unreasonable in supposing that the Legislature intended the public to sustain for the sake of the greater good to be obtained by the rest of the public from the railway, and consequently that the common law right of action on account of the annoyance was taken away. Doubts were for some time expressed by Judges as to the correctness of this decision (b); but its authority is established by the decisions in *L. B. & S. C. Ry. v. Truman* (c) and *Cowper Essex v. Acton L. B.* (d), the latter having reference to the effect of sewage works on an owner of land near, but not physically next to, the lands taken by a local authority under compulsory powers. And the doctrine has been also accepted by the Judicial Committee in numerous decisions (e). It must not, however, be forgotten that where persons are authorised by statute to create what would otherwise amount to an indictable nuisance, they are bound without any express enactment to mitigate the nuisance and diminish the annoyance arising therefrom by every means in their power (f).

The most conspicuous instances of interference by statute with common law rights are the cases where land may be taken compulsorily

(y) *Metropolitan Asylums Board v. Hill* (1881), 6 App. Cas. 193, 203. Both these passages from Lord Blackburn's opinions were quoted by Tucker, L.J., in *Marriage v. East Norfolk Rivers Catchment Board*, [1950] 1 K. B. 284, 292-293.

(z) (1860), 5 H. & N. 679, 685.

(a) (1832), 4 B. & Ad. 30.

(b) E.g., in *Powell v. Fall* (1880), 5 Q. B. D. 597, 601, Bramwell, L.J.

(c) (1885), 11 App. Cas. 45, 50 (n). See p. 256, *ante*.

(d) (1889), 14 App. Cas. 153.

(e) *Municipality of Raleigh v. Williams*, [1893] A. C. 540; *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Shea v. Reid-Newfoundland Ry.*, [1908] A. C. 520, 523; see p. 259, *ante*.

(f) See p. 259 *ante*.

by statute (Lands Clauses Acts), or where acts which, but for the statute would be ground for indictment or action, are authorised by the statute, and under it may be done, either without regard to common law rights at all (g), or subject to compensation to be awarded by special statutory procedure (h).

Effect of affirmative statute on common law.

2. Coke says (2 Inst. 200), that "it is a maxim in the common law that a statute made in the affirmative without any negative expressed or implied doth not take away the common law." But it is doubtful whether this statement can be described as a maxim or considered as more than a very slight presumption. In *Mayor of London v. R. (i)*, Alderson, B., said in the course of the argument: "The words 'negative' and 'affirmative' statutes mean nothing. The question is whether they are repugnant or not to that [common law] which before existed. That may be more easily shown when the statute is negative than when it is affirmative, but the question is the same." And the true rule for interpreting statutes which may affect the rules of common law and equity and legal and equitable remedies (whatever be the form of the statute), is to consider whether the statutory provision is repugnant to the former substantive or adjective law, or whether it merely operates to strengthen the former law by giving more effectual remedies, whether exclusive or alternative. This subject has already been discussed (*ante*, pp. 213 *et seq.*) with reference to remedies for breaches of statutes, and it is sufficient to refer to that chapter, and in particular to the observation of Willes, J., in *Wolverhampton New W. W. Co. v. Hawkesford (k)*.

(i) *New statutory remedy for infringing common law right does not oust equitable remedy.* The provision by a statute of a particular remedy for the infringement of a right of property created, enacted, or recognised as re-enacted does not oust the jurisdiction of the High Court to protect the right by equitable remedies, such as injunction, unless express provision is made excluding such remedy. This rule, it would seem, applies even where the particular remedy bars a common law right of action.

The equitable remedies formerly enforceable in the Court of Chancery and now enforced by the High Court are wider than the old common law remedies, and there is nothing (except the express provisions or necessary implication of a statute) to prevent the Court from granting an injunction to prevent the infringement of a statutory right of such a character that the Court would on its original jurisdiction take cognisance of it (*l*).

(g) *E.g.*, the exception of trade unions from liability for certain acts committed in contemplation or furtherance of a trade dispute (Trade Disputes Act, 1906, s.1).

(h) See p. 256, *ante*.

(i) (1848), 13 Q. B. 30, at p. 33, note (d).

(k) (1859), 6 C. B. (N.S.) 336; see p. 219, *ante*.

(l) *Stevens v. Chown*, [1901] 1 Ch. 894, 901, Farwell, J., and authorities there referred to.

In *Dr. Foster's Case* (m) it was held that "in a writ of mesne the process at common law was distress infinite, and although the Statute of Westminster the Second (13 Edw. 1, c. 9) gives more speedy process, and in the end forejudger, yet the plaintiff may take which process he will, either at the common law or upon the said statute." And where a private Act (3 & 4 Vict. c. xxvi, s. 1), after reciting that "it would be convenient that persons having demands against the said company should be entitled to sue the secretary," enacted that "all actions to be commenced against the said company *shall and lawfully may* be commenced against the secretary," it was held in *Blewitt v. Gordon* (n) that the enactment did not make it imperative to sue the secretary of the company, and that the common law right of bringing an action against any member of the company was not thereby taken away.

In *Great Northern Fishing Co. v. Edgehill* (o), the question arose whether section 4 of the Employers and Workmen Act, 1875, gave any remedy against a seaman for breach of his contract in the face of the provisions of the Merchant Shipping Act, 1854 (p). Field, J., said: "The duty under consideration in this case is an ordinary obligation to perform an ordinary contract of service, to the breach of which has been annexed the general remedy by action in favour of the employer ever since the contract of service itself. In order, therefore, to be able to hold that the employer is deprived of that remedy, the mere annexation of a new specific remedy would not by itself be sufficient; it must also appear from the statute to have been the intention of the Legislature that the general remedy should not co-exist, otherwise the new remedy will be merely cumulative and in aid of the general one" (q).

Common law remedy displaced where remedies are inconsistent. But if, as Lord Cranworth said in *O'Flaherty v. M'Dowell* (r), it appears "that the statutory right could not, without very great inconvenience, co-exist with the ordinary common law right, and so must have been intended as a substitutional, not an additional remedy," the common law remedy will be held to have been taken away. This was the view taken in *Steward v. Greaves* (s), in which it was held that a new remedy provided by the Country Bankers Act, 1826, by suing the public officer of the company annulled the common law right of suing an individual member of a company established under that Act.

(ii) *New statutory penalty for offence punishable at common law is presumably cumulative or alternative.* If a new penalty is imposed by a

(m) (1615), 11 Co. Rep. 56 b, 64 a.

(n) (1842), 1 Dowl. Pract. Cas. (N.S.) 815.

(o) (1883), 11 Q. B. D. 225, 226.

(p) 17 & 18 Vict. c. 104, s. 243; defining specific offences by seamen and their punishments; repealed and re-enacted as s. 225 of the Merchant Shipping Act, 1894.

(q) He cited *Mayor, etc., of Lichfield v. Simpson* (1845), 8 Q. B. 65.

(r) (1857), 6 H. L. C. 142, 158.

(s) (1842), 10 M. & W. 711. Cf. *Billing v. Reed*, [1945] K. B. 11, where it was held that damages were not recoverable by reason of the existence of a scheme under the Personal Injuries (Emergency Provisions) Act, 1939.

statute law for an offence which was previously punishable at common law (i), the statutory penalty is usually treated as cumulative (u), and not as taking away the former penalty at common law. "It is a clear and established principle," said Ashhurst, J. (x), "that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause on the ground of its being a misdemeanour" (y). Thus, in *R. v. Robinson* (z), the defendant was indicted at common law for refusing to obey an order of quarter sessions made upon him to keep and maintain his grandchildren. It was objected on his behalf that, as section 7 (a) of the Poor Relief Act, 1601, prescribed a particular penalty for this offence, the offence was no longer indictable at common law. But this objection did not prevail, for "although the rule is certain that where a statute creates a new offence by prohibiting something that was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued and no other, yet nevertheless if an offence was antecedently punishable at common law, and a statute is passed which prescribes a particular remedy by a summary proceeding, either method of proceeding may be pursued, because there the method of proceeding is cumulative, and does not exclude the common law punishment" (b).

In absence of specific statutory remedy, common law remedies available to enforce statutes. In the absence of a special and exclusive statutory remedy, common law and equitable remedies apply to enforce statutory rights or liabilities (c). This rule is well stated by Lord Eldon in *Weal v. West Middlesex Waterworks* (d): "Where an Act of Parliament as this (46 Geo. 3, c. 11) directs things to be done, or to be forborne to be done, the Legislature either provides the means for compelling such acts to be done, or restraints to prevent these being done which are to be forborne to be done, or if the Act contains no provision of either kind, the Legislature acts upon the supposition that the

(i) Where a statute inflicts a penalty for some offence which was before the passing of the statute punishable in the spiritual Courts, the jurisdiction of the spiritual Court is taken away by the statute if the penalty is inflicted directly *eo nomine* for punishment of the same offence as the ecclesiastical censure: *Cory v. Pepper* (1679), 2 Lev. 222. But if the ecclesiastical censure and the temporal penalty are *diverso intuitu*, the jurisdiction of the Ecclesiastical Court is not taken away: *Middleton v. Crofts* (1736), 2 Atk. 650.

(u) It is more accurate to call it alternative, for at common law no person may be twice punished for the same offence: *R. v. Miles* (1890), 24 Q. B. D. 423, 431; and see Interpretation Act, 1889, s. 33, *post*, Appendix B.

(x) *R. v. Harris* (1791), 4 T. R. 202, 205.

(y) See p. 213, *ante*, *West v. Downman* (1880), 14 Ch. D. 111, 120, Brett, L.J.; and *Cooper v. Whittingham* (1880), 15 Ch. D. 501, p. 506, Jessel, M.R.

(z) (1759), 2 Burr. 800, 804.

(a) S. 6 in Revised Statutes.

(b) See p. 310, *ante*.

(c) See pp. 211 *et seq.*, *ante*.

(d) (1820), 1 Jac. & Walk. 358, 371.

enactments are complete so far as they go, and that the laws of the Courts of common law and equity are sufficient to enforce the rights which the King's subjects have under the Act. But if it turns out that the Courts of law can give nothing but damages and that the Courts of equity cannot interfere to compel a specific performance . . . it is a defect which, whether it proceeded from a mistake of the Legislature, or, if I may say so, from its negligent inattention, no Court can supply." The Legislature has not said that the Courts can legislate, but that the Act is to be carried into execution by the known rules of law and equity; and the Courts are bound to try to find out, if possible, from the enactments or from the said rules, the means of enforcing the intention of the Legislature. In *Booth v. Trail* (e), an application was made to attach as a debt money which had accrued due to a retired police constable under 11 & 12 Vict. c. 14 (f). In opposition it was contended that the money was not a debt, and could not therefore be attached. Lord Coleridge, C.J., said: "It appears to me to be none the less a debt because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action."

(iii) *Common law incidents attach to certain statutory offences.* If a statute creates a new variety of something which previously existed at common law (for instance, if a new kind of felony is created by statute), all common law incidents will attach to that new variety. "It is a general rule," says Hawkins (g), "that where a statute makes an offence felony, it gives it the like incidents that belong to a felony by the common law." And again (h), he says that it "is incidentally implied in every statute making an offence felony, that every such statute does by necessary consequence subject the offender to the like attainder and forfeiture, etc., and also does require the like construction to all intents and purposes as is incident to a felony at common law." In *The Coalheaver's Case* (i), it was held that a "newly created felony necessarily possessed all the incidents which appertain to felony by the rules and principles of the common law," and therefore that persons aiding and abetting in the commission of a felony created by statute were equally guilty as principals. And on this ground it was held in *Gray v. R.* (k), that the common law right of peremptory challenge of jurors attached where the prisoner was tried for a felony punishable under 7 Will. 4 & 1 Vict. c. 85 (l). In *Levinger v. R.* (m)

(e) (1883), 12 Q. B. D. 8, at p. 10; *Green v. Penzance* (Lord) (1888), 6 App. Cas. 657, 675.

(f) Repealed in 1859 (22 & 23 Vict. c. 32, s. 7).

(g) *Pleas of the Crown*, Bk. II, p. 444.

(h) *Ibid.* Bk. I, p. 107.

(i) (1768), 1 Leach 64.

(k) (1844), 11 Cl. & F. 427.

(l) This Act was repealed in 1861 (24 & 25 Vict. c. 95) and replaced by *Offences against the Person Act*, 1861 (24 & 25 Vict. c. 100).

(m) (1870), L. R. 3 P. C. 282, 290, 291.

it appeared that by section 37 of the Victoria Juries Statute, 1865' (No. 272), the common law right of peremptorily challenging twenty jurymen in a criminal trial was extended with a limitation to the colony, and by section 38 of the same statute provision was made for allowing a mixed jury in the case of an alien, and the question then arose whether the right of peremptory challenge extended to the case of a mixed jury. It was held by the Judicial Committee that it did so extend, on the ground that the common law relating to juries, in the absence of any positive statutory enactment to the contrary, was not affected by the statute of 1865 (as that statute merely prescribed the composition of a mixed jury), and was applicable to the denizen as well as to the alien portion of a jury. "The statute," said the Court, "being in the affirmative, leaves the common law as to these unaffected . . . so that the right of peremptory challenge is not in any way prejudiced." The same rule is equally applicable to statutes which declare or imply that disobedience to their commands shall be a misdemeanour.

In *Re Sankey (n)*, Lord Esher, M.R., referring to an application under the Solicitors Act, 1888, said: "The Act makes no alteration in the practice of the Courts as regards the person who may make the application, but only provides that the applicant, whoever he may be, must go before the Incorporated Law Society in the first instance."

(iv) *Corporations created by statute.* In *Riche v. Ashbury Carriage Co. (o)*, it was said by several Judges that a corporation created by statute possessed all the attributes of a corporation at common law, unless any of those attributes were expressly taken away by the statute which created it. In the same case in the House of Lords (*p*), Lord Hatherley said: "When once you have given being to such a body as this, you must be taken to have given to it all the consequences of its being called into existence, unless by express negative words in the statute you have restricted the operation of the acts of the being you have so created." But as we have shown elsewhere, the powers of a statutory corporation are limited to those acts which by its statutes it is enabled to do and acts necessarily incidental thereto (*q*).

(n) (1890), 59 L. J. Q. B. 238, 243.

(o) (1874), L. R. 9 Ex. 263.

(p) (1875), L. R. 7 H. L. 653, 685.

(q) See p. 253, *ante*.

CHAPTER V

EFFECT ON EARLIER ENACTMENTS

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General rule.

1. Parliament, in the exercise of its supreme legislative capacity, can extend, modify, vary, or repeal Acts passed in the same or previous sessions (a). It is, consequently, a matter of daily business for the Courts to consider the exact effect of later upon earlier enactments, in order to see whether they can wholly or in part stand together. The rule of law on the subject is thus stated by North, J., in *Re Williams* (b): "The provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to the particular point, or from implication or inference from the language used." The particular rules of construction applicable for the enforcement of this rule are stated in the rest of this chapter, mainly with reference to repeal, as modification of prior enactments is in substance either a partial repeal, or imposes some condition or fetter upon the operation of the earlier law (c).

(a) See p. 321 *post*.

(b) (1887), 36 Ch. D. 573, 578.

(c) As to enabling Acts, see Part II, ch. 2., *ante*.

In the case of statutes passed about the same time the question may arise, whether they can be read together and the later taken as explaining, and not repealing, the earlier Act. Thus on a question of section 8 of the Real Property Limitation Act, 1874, Cotton, L.J., spoke as follows (*d*): "One difficulty I have felt has been in consequence of the case of *Hunter v. Nockolds* (*e*), decided by Lord Cottenham in which he expressed an opinion that, although in actions brought to recover money issuing out of the lands, only six years interest could be allowed, yet he based his decision on this ground, that one must take the two statutes, 3 & 4 Wm. 4, c. 27 (Real Property Limitation Act, 1833, no action for rent or interest on money charged on land after six years) and 3 & 4 Wm. 4, c. 42 (Civil Procedure Act, 1833, no action for rent or money secured by specialty after twenty years) together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was passed three weeks before the other and therefore he said you must read the two together, and take the later one only as an explanation of the other Act." Quoting the above passage from the judgment of Cotton, L.J., in *Sutton v. Sutton*, Bray, J., in *Shaw v. Crompton* (*f*) said: "The result of that decision was in terms to say that though the two Acts of 1833 were to be read together, there was not the same necessity to read the Act of 1874 and the Civil Procedure Act of 1833 together and that in effect section 8 of the Act of 1874 did not qualify section 3 of the earlier Act."

Where a considerable time has elapsed between the passing of the two Acts, it may be necessary to read the later Act as repealing or qualifying the earlier.

The general rule applicable was stated by Fletcher-Moulton, L.J., in *Macmillan v. Dent* (*g*), with reference to the Copyright Act, 1842. "The Act of 1842 did two things. It established a new copyright law and it wiped out all the old statutes relating to copyrights. For the sake of clearness I will use the phrase 'it had an enacting part and it had a repealing part.' The enacting part must have full force given to it whatever be the pre-existing statutes. If those provisions are contrary to those of the Act of Anne, these provisions being in a later Act override and *pro tanto* extinguish the provisions of the earlier Act. But apart from this, the repealing part wiped these earlier Acts off the statute book. The consequence of this would have been that all the rights which had been created under them and had not expired would have been wiped out. The enabling part of the Act of 1842 applies only to books published after that date, but if the preceding statutes had been wiped out *simpliciter*, all the books published before that date which were then in the enjoyment of copyright would have lost their privilege." He then explained that this was not intended,

(*d*) *Sutton v. Sutton* (1882), 22 Ch. D. 511, 518, 519.

(*e*) (1849), 1 Macn. & G. 640.

(*f*) [1910] 2 K. B. 370, 377.

(*g*) [1907] 1 Ch. 101, 124.

and that section 1 of the Act of 1842 preserved the older Act so far as needed to secure rights acquired under them and not expired.

Express repeals.

2. To ascertain whether a public general statute of England (*h*), Great Britain, or the United Kingdom has been expressly repealed reference may be made to the chronological tables to the statutes annually published under official authority (*i*). At the end of each annual volume of the statutes published by the King's printer of Acts of Parliament will also be found a table showing the effect of the year's legislation on former statutes. The chronological table does not take notice of the repeal of preambles or of certain minor abbreviations of former statutes effected by Statute Law Revision Acts (*j*); but these excisions can be ascertained by reference to the text of the statutes printed in the second revised edition of the statutes or to the Statute Law Revision Acts themselves.

With reference to the subject of express repeal, statutes fall into two classes—those passed before and those passed since 1793. Acts prior to that year, unless a contrary intention appeared, all came into force as of the first day of the session in which they were passed (*k*). But since that date they come into force on the day when they receive the royal assent, unless another date is specified or provided for in the Act as it very often is (*l*). It was therefore deemed needful to insert in all Acts passed before 1793 a section empowering the amendment, alteration, or repeal of any enactment in the session in which it was passed. This provision was probably superfluous (*m*), inasmuch as Parliament is not fettered by any restrictions in its supreme legislative authority, such as are imposed upon the legislatures of the United States, *e.g.* as to passing *ex post facto* laws (*n*). And it appears to be a constitutional necessity as well as an established rule of construction that the last utterances of the Legislature should prevail over earlier statutes inconsistent with it (*o*); but the clause above

(*h*) As to repeals of Scottish Acts, see Statute Law Revision (Scotland) Act, 1906; as to revision of statutes of Irish Parliaments, see p. 45, *ante*.

(*i*) It is to be noted that this table only gives the statute which finally repealed a former statute or set of enactments, and that occasionally enactments are repealed twice over, either *per incuriam* or in order to complete *uno actu* a repeal previously made piecemeal of all or some of the enactments intended to be swept away. In other words, the table shows the latest action of the Legislature in repealing a former enactment, and it is not necessarily to be inferred that no part of the enactment had been repealed before the time indicated by the repealing enactment mentioned in the table.

(*j*) See 61 & 62 Vict. c. 22, s. 1. A list of these Acts is given in the Chronological Index to the statutes, tit. "Statute Law Revision."

(*k*) See p. 48, *ante*.

(*l*) 33 Geo. 3, c. 13, p. 49, *ante*.

(*m*) S. 18 of the Customs and Inland Revenue Act, 1889, was repealed by s. 15 of the Revenue Act, 1889, in consequence of the decision of the Court of Appeal in *Inland Revenue Commissioners v. Angus* (1889), 23 Q. B. D. 579.

(*n*) See the Act of 1886 (49 & 50 Vict. c. 11) to provide for assessing compensation for the Piccadilly riots.

(*o*) *Re Derbyshire and Staffordshire County Councils* (1890), 54 J. P. 566.

mentioned was usually inserted until 1850, when it was inserted in section 1 of Brougham's Act (*p*), and it is now incorporated in section 10 of the Interpretation Act, 1889 (*q*).

Methods of express repeal. It is now usual to annex a repeal schedule to all Acts which considerably alter the statute law, by which means many doubts as to the inconsistency of enactments are settled by Parliament (*r*). In some cases a provision is inserted to the effect that "all provisions inconsistent with the Act are repealed" (*s*), by which lawyers are simply put on inquiry as to inconsistency, or left to wait till by a Statute Law Revision Act the virtually repealed enactments are expurgated; for an Act repealing all enactments inconsistent with itself really goes no further than the general law.

Usually the sole questions arising upon express repeal are the extent of the terms employed, and the qualifications, if any, stated or implied in the repealing enactment. The former question is dealt with in the chapter on "Mistake" (Part II, Chap. VIII, *post*).

To constitute an express repeal there must be not only a reference to the prior Act, but also the use of words apt to effect its repeal. Thus, in a Canadian case the reference contained in a subsequent Act to a prior Act as being marked "effete" was held insufficient as not amounting to legislation (*t*).

Difficulties sometimes arise as to the extent of a repeal owing to the mode of reference to the earlier enactment. But these are removed as to Acts passed after 1889 by section 35 (3) of the Interpretation Act, 1889, (*u*), which provides that "a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word 'section' or other part mentioned as forming the beginning and as forming the end of the portion comprised in the citation" (*x*).

Repeal without savings before 1890. The effect of a repeal without any express savings is thus stated by Tindal, C.J., in *Kay v. Goodwin* (*y*),

(*p*) 13 & 14 Vict. c. 21.

(*q*) *Post*, Appendix B.

(*r*) *Garnett v. Bradley* (1878), 3 App. Cas. 944, 965, Lord Blackburn. Mr. Greaves pointed out in 1861 as to the Statute-book as he knew it, that "there are many instances in which even direct repeals which refer to the enactment intended to be repealed are so worded that it is impossible to ascertain how much of the old statutes are repealed. Here there must be actual legislation to fix what is and what is not repealed." A second class of repeals is one that has been adopted of late years. It is the repealing in express terms every enactment inconsistent with the Act in which the repeal is found, without referring to any Act at all; so that doubt is thrown on every previous enactment, and it must be compared with the whole and every part of the repealing Act to ascertain whether it is repealed or not. Such repealing clauses are nearly as bad as implied repeals, which abound in the Statute-book, and are the most difficult of all to ascertain: Greaves, *Criminal Law Consolidation Acts* (2nd ed.), Intr. p. xvii.

(*s*) *E.g.*, in 56 & 57 Vict. c. 61, s. 2. Cf. note (*r*) *supra*.

(*t*) *Scottish American Investment Co. v. Elora* (1881), 6 Upp. Can. App. 628, 637.

(*u*) *Post*, Appendix B.

(*x*) This was a common form which for some time previously had been inserted in the schedule to Acts containing many repeals.

(*y*) (1830), 6 Bing. 576, 582.

where he says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law." And in *Surtees v. Ellison* (z), Lord Tenterden says: "It has long been established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." So an offence committed against a penal Act whilst it was in force could not be prosecuted after the repeal of the statute (a); nor could pending proceedings be further prosecuted after the repeal, even to the extent of applying for a certificate for costs (b).

But an action wholly concluded before the repeal is not thereby affected. So where a party brought an action for crim. con. in Hong Kong and his action was dismissed for want of jurisdiction, an ordinance of 1895 having abolished the action. Afterwards this ordinance, which had taken away the jurisdiction, was repealed by one of 1908 and the jurisdiction was thereby revived. The plaintiff after 1908 brought his action on a cause of action accruing before 1908, when it appeared that he had already had an action dismissed before the jurisdiction revived. It was held that the matter was *res judicata*, judgment having been given against him and the whole matter thereby concluded before the revivor (c). The Privy Council said that the defendant had acquired a vested right which was a bar to an action on the same facts brought after the Ordinance of 1908. The Legislature could not have intended the Ordinance of 1908 not only to alter the previous law but also "to deprive a litigant of a judgment rightly given and still subsisting." This is also an example of a repealing enactment expressly reviving an earlier one.

Implied savings under Interpretation Act, 1889. In Acts passed in or since 1890 certain savings are implied by statute in all cases of express repeal, unless a contrary intention appears in the repealing Act. They are as follows (d):—

The mere repeal does not—

"Revive anything (e) not in force or existing at the time when the repeal takes effect; or

(z) (1829), 9 B. & C. 750, 752.

(a) *R. v. M'Kenzie* (1820); Russ. & R. 429.

(b) *Morgan v. Thorne* (1841), 7 M. & W. 400; *Butcher v. Henderson* (1868), L. R. 3 Q. B. 335.

(c) *Lemm v. Mitchell*, [1912] A. C. 400.

(d) Interpretation Act, 1889, s. 38 (2), *post*, Appendix B. See *Roberts v. Potts*, [1893] 2 Q. B. 33; [1894] 1 Q. B. 213, doubting if the general provisions of this section of the Interpretation Act could override the special provisions of the Tithe Act, 1891, s. 6. As to the difficulties created for draftsmen by this section, see Thring, p. 99.

(e) This includes a statute, law, or right. It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or recreate an expired right: *Lauri v. Renad*, [1892] 3 Ch. 402, 420, Lindley, L.J.; and cf. *Gwynne v. Drewitt*, [1894] 2 Ch. 616.

“Affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

“Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed (*f*); or

“Affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed (*g*); or

“Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed as if the repealing Act had not been passed.”

It had been usual before 1889 to insert provisions to the effect above stated in all Acts by which express repeals were effected. The result of this enactment is to make into a general rule what had been a common statutory form, and to substitute a general statutory presumption as to the effect of an express repeal for the canons of construction hitherto adopted.

The effect of section 38 (2) of the Interpretation Act has been considered in several cases:

In *Heston and Isleworth Urban Council v. Grout* (*h*), it appeared that under a provision in the Public Health Act, 1875, notice had been given to frontagers to pave and make up a certain street. The section under which the notice was given was in effect repealed as regards the district by the adoption of the Private Streets Works Act, 1892, but it was held that the notice remained effective as it was a “thing duly done” under the repealed enactment, or that by virtue of the notice a right or liability had been incurred thereunder.

A mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by any individual towards availing himself of that right, cannot properly be deemed a “right accrued” within the meaning of a saving section such as is contained in section 38 of the Interpretation Act (*i*). But where under the Agricultural Holdings Act, 1908, a tenant had become entitled to compensation by his landlord’s having given him notice to quit, it was held that he had acquired a right to compensation which was not lost by the repeal of the Act before an award of compensation had

(*f*) As to the meaning of “right accrued,” see *Abbot v. Minister for Lands*, [1895] A. C. 425; *Reynolds v. Att.-Gen. for Nova Scotia*, [1896] A. C. 240. *Starey v. Graham*, [1899] 1 Q. B. 406, 411; *Ward v. British Oak Insurance Co. Ltd.*, [1932] 1 K. B. 392, 397, 398.

(*g*) See Archbold: Cr. Pl. (31st ed.), p. 9; 1 Russell: Cr. (9th ed.), p. 49.

(*h*) [1897] 2 Ch. 306.

(*i*) See note (*f*) *ante*.

been made and that he was entitled to continue the proceedings necessary for its recovery (j).

The section provides that a repeal is to have these results only if a contrary intention does not appear in the repealing Act. In *Lewis v. Hughes* (k), it was held that the expression that the repealed Act "shall cease to have effect" does not show a contrary intention. And in *Henshall v. Porter* (l), McCardie, J., held that a contrary intention was not to be inferred from the words "no action for the recovery of money under the said section shall be entertained" in the Gaming Act, 1922, which repealed section 2 of the Gaming Act, 1835; and that the repeal did not prevent the bringing of an action for a cause of action which had accrued before the repeal. A contrary intention such as is contemplated by the section as being sufficient to prevent the preservation of a right or privilege acquired or secured under a repealed Act may arise from necessary implication and "the full effect of repeal as stated in *Kay v. Goodwin* (m), must follow: viz: that the Act is taken to have been obliterated from the Statute-book, where as here the action was not commenced, prosecuted and concluded while the Act of 1920 was in force." (n).

In some cases an amending Act has been held, by necessary implication, to continue certain essential provisions in a repealed Act. In *Wigram v. Fryer* (o), a local Act incorporating the Lands Clauses Acts was subsequently amended by an Act repealing section 33 of the earlier Act, which contained provisions as to selling or letting. But North, J., held that the repealing Act by implication continued, for the execution of the purposes of the amending Act, the powers given by section 33.

Qualified repeals. Where an Act confirming jurisdiction is repealed by a later Act containing a saving clause to the effect that the repeal shall not affect any jurisdiction created by the repealed Act, that jurisdiction, in the absence of inconsistency between the two Acts, should be treated as continuing notwithstanding the repeal. The rule is thus stated by Collins, M.R., in *Re R.* (p), which turned on the question whether section 5 of the Trustee Act, 1850, which applied to property held by a criminal lunatic, was wholly repealed by section 342 of the Lunacy Act, 1890, which does not deal directly with criminal lunatics. He said: "There were one or two other cases cited which have an important application to the present case, that is to say, cases where you find in an Act a repealing clause followed by a saving clause. There you have to see how far the two enactments can co-exist.

(j) *Hamilton Gell v. White*, [1922] 2 K. B. 422; cf. *Falcon v. Famous Players Film Co.*, [1926] 1 K. B. 393; 2 K. B. 474.

(k) [1916] 1 K. B. 831. *Moakes v. Blackwell Colliery Co.*, [1925] 2 K. B. 64; *Briggs v. Thomas Dryden & Sons*, [1925] 2 K. B. 667.

(l) (1922), 39 T. L. R. 409. See also p. 370 *post*.

(m) (1830), 6 Bing. 576; see p. 322, *ante*.

(n) *Hosie v. Kildare County Council*, [1928] Ir. R. 47, 67.

(o) (1887), 36 Ch. D. 87; see p. 106, *ante*.

(p) [1906] 1 Ch. 730, 736.

It seems to me that the principle laid down in those cases is applicable to the present case. And that principle is this: Where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the Judges, in holding that there was a saving clause large enough to annul the repeal, said you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as *pro tanto* wiped out. That is settled by the cases of *Re Busfield* (q) and *Hume v. Somerton* (r). In both those cases the Judges relied upon the incompatibility of the substituted enactments with the old enactments, and held that in consequence of that incompatibility the jurisdiction under the old Act could not remain; but they were prepared to hold that the saving clause would, if there were no incompatibility between the enactments, have the effect of annulling the repeal (s). In this state of the authorities it appears to me that there is enough here to enable us to hold that under this saving clause (in the Act of 1890) the useful jurisdiction under the Act of 1850 in the case of criminal lunatics has not been absolutely wiped out. It would be a public misfortune if there were no jurisdiction over funds held by criminal lunatics, and, in my opinion, we are not bound to hold that in consequence of the Act of 1890 no such jurisdiction now exists. On the contrary it seems to me to have been the intention of this saving clause to preserve that jurisdiction. Accordingly, I am of opinion that the jurisdiction under the old Act remains, though the practice must be governed by the new Act."

Repeals do not revive dead law. Where an Act passed after 1850 contains a clause repealing a repealing enactment, this does not revive any enactment previously repealed, unless words are added reviving the last-mentioned enactment (t). This provision supersedes the

(q) (1886), 32 Ch. D. 123, 131, 132, Cotton, L.J. In this case it was held that as the Rules of the Supreme Court, 1883, amounted to a code on the subject in dispute, it would be wrong to hold that a saving clause in the above form preserved a further jurisdiction under the repealed Act.

(r) (1890), 25 Q. B. D. 239. Since the repeal of the Common Law Procedure Act, 1852, the R. S. C. form a complete code as to the renewal of writs. Charles, J., at p. 243.

(s) The correctness of the observations of Baggallay, L.J., in *Sayers v. Collyer* (1884), 28 Ch. D. 103, 107, was doubted. In that case he was of opinion that the Statute Law Revision Act, 1883, had not taken away the jurisdiction as to damages given to Chancery Judges by Lord Cairns' Act.

(t) Interpretation Act, 1889, s. 11 (1), *post*, Appendix B. An example of a repealing enactment expressly reviving an earlier enactment will be found in *Lemm v. Mitchell*, [1912] A. C. p. 323, *ante*. S. 21 of the New Zealand Interpretation Act of 1888, which was framed on the model of 13 & 14 Vict. c. 21, has been held to create a presumption against revival only where the context does not manifestly indicate a contrary intention. *Lothian v. Bugden* (1903), 23 N. Z. L. R. 901, 903, Williams, J. See also p. 312, *ante*.

canon of construction previously adopted, and alters the presumption as to the intention to revive a defunct law. Where an Act altering the common law is repealed by an Act passed after 1889, repeal of the statute appears not to revive the common law unless a contrary intention appears (u).

Construction of repeal clauses. The general rule as to the way in which repealing sections are to be regarded by the Courts is well expressed in *Hough v. Windus* (x). In that case a question arose as to the effect of the Bankruptcy Act, 1883, upon the Statute of Westminster the Second (13 Edw. 1, c. 18) and writs of *elegit*. Bowen, L.J., said: "It appears to me that the answer to this somewhat formidable argument [upon sections 146 and 169 of the Act of 1883] is to be found in a study of the framework of the Bankruptcy Act, 1883, so far as it works a repeal of previous legislation. It does not seem to me to be possible, without misunderstanding the scheme of drafting which the Legislature has adopted, to treat the repealing section (169) as an independent section, or one intended to do more than, for sake of symmetry, to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. I have examined schedule 5 in detail, which contains the list of previous Acts of Parliament all or part of which is to be repealed by section 169, and I have come to the conclusion that the idea upon which the Bankruptcy Act, 1883, has been framed was to enact, in the first place specifically, a complete code of provisions which, so far as they are inconsistent with any previous legislation, would repeal it by implication, and then over again, at the very last, to clear the Statute-book, so to speak, by section 169, and to sweep into one compendious repeal section all the statutes and sections of statutes which in the earlier part of the Act had been impliedly done away with already, the Bankruptcy Act, 1869, being itself among the number."

Statute Law Revision Acts.

3. *History.* The first proposals for the revision of the statute law were made by Edward VI, James I, and Lord Bacon (y), but the process of statute law revision did not begin till 1856, with the repeal in that year of a series of obsolete Acts (z). Since the establishment of the Statute Law Committee in 1868, Statute Law Revision Acts have been of frequent occurrence (a). They have been applied to the Acts of the Irish and Scottish Parliaments (b). It has already been pointed

(u) Interpretation Act, 1889, s. 38 (2), *post*, Appendix B.

(x) (1884), 12 Q. B. D. 224, 236.

(y) See Ruffhead, Statutes, vol. i, Pref. p. 20.

(z) See Ilbert, p. 57; Law Journal Newspaper, vol. xxiii (1888), p. 413.

(a) A list of them is given in the Chronological Index to the Statutes (published annually) tit. "Statute Law Revision." The most recent is the Statute Law Revision Act, 1950 (14 Geo. 6, c. 6).

(b) See the Statute Law Revision (Scotland) Act, 1906.

out (c) that, theoretically, no English Act grows obsolete. The result of this doctrine was that, in the absence of an authoritative expurgation of the Statute-book, there was always some danger of being brought within the four corners of some forgotten Act, or of the alternative of a lengthy and puzzling inquiry into the exact amount of inconsistency between earlier and later Acts.

The late Mr. Justice Wright (then Mr. R. S. Wright) pointed out in 1878 (d) that many Acts were retained in the Statutes Revised (and this is so even in the second edition) which, although unrepealed as regards England, are yet for all practical purposes obsolete. And his view was in 1890 indorsed by a select committee of the House of Commons (e) on the first Statute Law Revision Bill of that year: "Your committee have been struck, in the course of their examination of the Statute-book, by the large number of statutes of little or no practical utility which still remain unrepealed. This remark applies with special force to Imperial Acts now operative in Scotland or Ireland only, as well as to many Acts of the Parliament of Ireland before the Union. Modern repealing Acts have frequently been expressed to apply to England only where we find no reason to think that, in point of fact, the Act or part of an Act repealed for England has any practical application at the present day to the circumstances of Scotland or Ireland as the case may be." This expression of opinion has resulted in increased and emboldened activity in the expurgation of dead law.

Method. The principles upon which the selection of enactments for inclusion in Statute Law Revision Acts is made are thus stated in the memoranda prefixed to the Bills when introduced:—"The first schedule is intended to comprise (as the preamble to the Bill states), besides superfluous words of enactment, enactments which have *ceased to be in force* otherwise than by express specific repeal, or have by lapse of time or otherwise become *unnecessary*, and also such parts of titles, preambles, recitals, and enacting words as are intended to be omitted in future editions of the statutes under the authority of the Bill (f).

"I. For the purposes of the schedule, six different classes of enactments are considered as having *ceased to be in force*, although not expressly and specifically repealed; namely, such enactments as are—

- "1. *Expired*—that is, enactments which, having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for periods now gone by effluxion of time;

(c) See p. 4, *ante*.

(d) Report relating to Criminal Law and Procedure, 1878 (H. L.), No. 178.

(e) Parl. Rep. 1890—C—100, p. iii.

(f) See Statute Law Revision Acts, 1908, 1927, 1948 and 1950.

- " 2. *Spent (g)*—that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required;
- " 3. *Repealed in general terms*—that is, repealed by the operation of an enactment expressed only in general terms as distinguished from an enactment specifying the Acts on which it is to operate;
- " 4. *Virtually repealed*—where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;
- " 5. *Superseded*—where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;
- " 6. *Obsolete*—where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances (*h*).

"II. For the purpose of the schedules, enactments are considered *unnecessary* where the provisions are of such a nature as not to require at the present day statutory authority.

"Where any enactment is comprised in the schedules on any ground not above explained, the ground of repeal sufficiently appears from the expression used in the third column of the schedule to the Bill, which is, however, not matter for consideration by the Courts" (*i*).

Saving clauses in Statute Law Revision Acts. The saving clauses in Statute Law Revision Acts are drawn with great care (*k*).

- (1) They usually confine the effect of the repeal to the United Kingdom, leaving it open to colonial legislatures to deal with Acts operating as part of the colonial law (*l*).
- (2) They also contain (in addition to the savings above referred to) (*m*) the following savings:—

- (a) Enactments not comprised in the schedule (*i.e.*, Acts incorporated with enactments repealed) are unaffected by the inclusion in the schedule, of Acts by which the omitted Acts have been repealed (*n*), confirmed, revived, or

(*g*) As to the use of the term "spent," see 1 Bl. Comm. (14th ed.), p. 44; Second Report of the Statute Law Commissioners, p. 7; and *Warren v. Windle* (1803), 3 East 205; and p. 387 *post*. As to the difference between a law expired and a law spent, see *Callis on Sewers* (1824), 95.

(*h*) As to desuetude, see p. 4, *ante*.

(*i*) See p. 123, *ante*.

(*k*) It is to be regretted that the statements in the Bill of the reasons for repeal are not included in the Act.

(*l*) See chaps. viii, ix, *post*; 28 & 29 Vict. c. 63 (Act to remove doubts as to the validity of Colonial Laws, 1865).

(*m*) See p. 323, *ante*.

(*n*) This is covered by the Interpretation Act, s. 38 (2), *post*, Appendix B.

perpetuated. Temporary Acts subsequently made perpetual are dealt with by excision of the clause as to duration and the Act making them perpetual, thus destroying their history to some extent.

- (b) Enactments in which a repealed enactment has been applied, incorporated, or referred to, are unaffected by its repeal (*o*).

Effect of Statute Law Revision Acts. The effect of Statute Law Revision Acts is, in the main, literary only. They excise dead matter, prune off superfluities, and reject clearly inconsistent enactments. Farther than this they do not profess to go (*p*). It is rare for any serious error to be made in any of them. In one or two cases the wrong Act has been repealed by a misprint (*q*), and in one or two other cases it has been thought advisable to re-enact or revive an enactment included in a Statute Law Revision Act (*r*).

Under powers given by the Statute Law Revision Act, 1890, earlier Acts have been abbreviated by the excision of words made unnecessary by the Interpretation Act, 1889. And the Statute Law Revision Act, 1893, and subsequent Acts have authorised the revisers, in preparing the second revised edition of the statutes, to substitute references by a statutory short title for references to the full title.

In dealing with Acts earlier than the seventeenth century, the effect of Statute Law Revision Acts appears to be, not to alter the law, but to leave outstanding as common law what has by long establishment become hardly distinguishable from it. And it must not be hastily assumed that an Act or section is repealed because it is specified in the schedule to a Statute Law Revision Act. In *Northam Bridge Co. v. R.* (*s*) an Act repealed, among many others, by the old General Turnpike Act was found to be so far revived by an obscurely framed exception in a later Act as to exempt the Postmaster-General from payment of toll for use of a bridge made under special statutory authority, and as to preclude what might have been an interesting argument on the question of exemption by prerogative (*t*).

Repeal of preambles by Statute Law Revision Acts. The repeal or omission of preambles effected by recent Statute Law Revision Acts (*u*),

(*o*) See Interpretation Act, s. 38 (1) *post*, Appendix B; *Willingale v. Norris*, [1909] 1 K. B. 57.

(*p*) See *Huffam v. North Staffordshire Ry.*, [1894] 2 Q. B. 821.

(*q*) See the Statute Law Revision Act, 1888, and the Finance Act, 1897, s. 7.

(*r*) *E.g.*, 10 Geo. 4, c. 44, s. 9.

(*s*) (1886), 55 L. T. 759.

(*t*) 3 L. Q. R. 114. Postmen had in fact paid toll for 80—90 years. See also *Gas Light and Coke Co. v. Hardy* (1886), 17 Q. B. D. 619.

(*u*) Ruffhead and the Statute Law Revision Committee differ as to the value of a preamble. Ruffhead says (Statt. at Large, 1769, vol. i, Pref. p. xxii): "By having the statute at large before him, he has the benefit of the preamble, which, as Lord Coke observes, is a good guide to discover the meaning of the Act, or rather, a key which opens to the knowledge of it; and it is a rule of the law that the Preamble must be taken for Truth. The preamble generally sets forth the mischief intended to be remedied, and by having the chain of Acts under his eye the reader may perceive how the remedy operated and how it was counteracted, by which means he will be better able to judge of the full end and scope of the Legislature with respect to

is intended to carry out the recommendations of a select committee of the House of Commons (x) which in 1890 came to the conclusion that the process of statute law revision might be safely made much more extensive and valuable by the repeal of such of the preambles of scheduled Acts as are not required for the purpose of explaining or interpreting the Acts to which they are prefixed and were not of any such historical interest as to make it desirable that they should be reprinted in future and revised editions of the statutes. This procedure undoubtedly saves a good deal of printing, but is open to somewhat serious objections. (1) It is difficult for a draftsman to decide offhand what light the Courts would derive from a preamble in construing a statute; (2) the omission makes it necessary for Courts and lawyers, out of caution, to use not the revised statute but the full text, when a question of construction arises; and (3) the opinion of a Parliamentary committee on the effect of a preamble cannot be taken into account in the construction of a statute.

It seems to be safe to deal with preambles in this way only when the sections to which the repealed part clearly refers are also repealed, or where the Courts have definitely decided on the relation of the preamble to the enacting part.

Incorporated Acts.

4. The effect of incorporating one Act with another is presumably to make them parts of the same code (y).

Where an Act is to be construed as one with an earlier Act, *prima facie* the later Act is not of wider application than the earlier Act. Thus, it was held in *Cox v. Andrews* (z), that the Betting Act, 1874, was confined to bets mentioned in the Betting Act, 1853—i.e. to bets and wagers made in a house, office, room, or other place kept for the purpose of betting. The Parliamentary Oaths Act, 1866, prescribed a form of oath and a penalty for not taking it. The Promissory Oaths Act, 1868, altered the form of oath and re-enacted the Act of 1866. The Statute Law Revision Act, 1875, repealed the Act of 1866 so far as related to the form of oath. In *Clark v. Bradlaugh* (a) the extent of

the subject of his inquiry": See p. 186, *ante*. The omission of the preambles in the Revised Statutes detracts from their value to lawyers, who, if an Act is obscure, can never feel safe without recourse to the full text, which is, for purposes of construction, as fully in force as if the Statute Law Revision Act had not touched its contents, for the Statute Law Revision Acts from 1890 do not repeal, but merely authorise the omission in whole or part of certain preambles—Ilibert: *Legislative Methods and Forms*, 72.

(x) Parl. Rep. 1890—C—110, p. iii.

(y) See p. 206, *ante*. As to difficulties caused by incorporating parts of the same Act with two different sets of prior statutes, e.g., the Food and Drugs Acts, 1875–1927, consolidated in the Food and Drugs (Adulteration) Act, 1928; Food and Drugs Act, 1938; and the Customs Consolidation Act, 1876. See *R. v. Otto Monsted, Ltd.*, [1906] 2 K. B. 456.

(z) (1883), 12 Q. B. D. 126.

(a) (1881), 8 Q. B. D. 63, 69. Cf. *Morisse v. Royal British Bank* (1856), 1 C. B. (N.S.) 67, 86, *Williams, J.*, *R. v. Minister of Health, ex p. Villiers*, [1936] 2 K. B. 29.

this repeal came into question, and Brett, L.J., described the last Act as an Act of supererogation, and said that the contention laid before the Court, that the penalty of the Act of 1866 was taken away by the Act of 1875, obtained its colour only from the form in which the amendments had been made in 1868; and added: "There is a rule of construction that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second, as the incorporated provisions have become part of the second statute." This rule is now included in section 38 (1) of the Interpretation Act, 1889 (*b*), with a further provision that, where a consolidation Act has effected the repeal, the unrepealed enactment is to be read as referring to the provision in the repealing Act corresponding wholly or with modifications to the enactment to which reference was originally made (*c*).

Explanatory Acts.

5. Where an Act is expressed to be enacted for the explanation of a prior enactment, *prima facie* it is confined to the same subject-matter as the prior enactment. 1 Will. & Mar. c. 30, was passed to encourage mining for the baser metals therein mentioned. 5 & 6 Will. & Mar. c. 6, was enacted for the better explanation of the earlier Act. In *Att.-Gen. v. Morgan* (*d*) it was held that the latter enactment did not apply to mines worked for gold, although the rock in which the gold was found contained the baser metals mentioned in the earlier Act.

Consolidation Acts.

6. Consolidation is the reduction into a systematic form of the whole of the statute law relating to a given subject, as illustrated or explained by judicial decisions (*e*). "The very object of consolidation is to collect the Statutory Law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing when the consolidating Act was passed" (*f*). Referring to section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, Lord Hanworth, M.R., said:

(*b*) *Post*, Appendix B.

(*c*) As to the effect of the repeal by a Statute Law Revision Act, of a clause in a statute which is incorporated by reference into another statute, see *Willingdale v. Norris*, [1909] 1 K. B. 57, 86, where the London Hackney Carriage Acts of 1850 and 1853 were to be construed as one Act, and Walton, J., held *semble* that the Statute Law Revision Act, 1874 which partially repealed section 29 of the London Hackney Carriages Act, 1843, did not, as far as the London Hackney Carriage Act, 1850 is concerned, affect the operation of section 29 of the Act of 1843.

(*d*) [1891] 1 Ch. 432.

(*e*) Encyc. English Law (2nd ed.), vol. iii, p. 488, by Sir Courtenay Ilbert; Thring, p. 14.

(*f*) *Administrator-General of Bengal v. Prem Lall Mullick* (1895), L. R. 22 I. A. 107, 116, *per* Lord Watson.

“ The object therefore of the Act was to consolidate and reproduce the law as it stood before the passing of that Act ” (g).

Numerous consolidation Acts have been passed by Parliament (h) in the last seventy years, beginning with the Criminal Law Consolidation Acts of 1861, and since 1868 (i) the process has gone on with growing rapidity (k) *pari passu* with revision.

The effect of most of these Acts may be described as purely literary. In so far as the Act is purely a consolidation Act, although it may repeal the reproduced enactments, the repeal is merely for the purpose of rearrangement, and there is no moment at which the substance of the older enactments ceases to be in force (l), although it is true that its ancient form is destroyed by the process of reproduction and repeal. The consolidation merely places together in a later volume of the Statute-book enactments previously scattered over many volumes (m). But it must not be forgotten that it is almost inevitable that in the process of consolidation the rearrangement of the former Acts and the modernisation of the language should to some extent alter the law. And often a consolidation Act is not a statute merely collecting into one chapter an original or principal Act with subsequent collecting amendments and modifications, but involves the co-ordination and simplification of former enactments (n).

The consequences which flow from these facts may be briefly stated thus:—

(1) The Courts will lean against any presumption that such an

(g) *Gilbert v. Gilbert and Boucher*, [1928] P. 1, 7; referring to *Mitchell v. Simpson* (1890), 25 Q. B. D. 183.

(h) More progress has been made in the consolidation of the statute law of the colonies than in that of the United Kingdom. In Canada the statutes of the Dominion and most of the provinces from time to time are revised and consolidated. Australia largely follows the same plan, as do many of the Crown Colonies. In India, many branches of the law have been codified. See Ilbert, ch. ix.

(i) When the Statute Law Revision Committee was established. See Thring, p. 10; Ilbert, p. 65. In 1893, a joint committee of both Houses reported on the work of the committee. (Parl. Pap. 1893—C—22; and Ilbert, p. 72.)

(k) *E.g.*, the Customs Laws Consolidation Act, 1876; the Sheriffs Act, 1887; the Coroners Act, 1887; the Stamp Act, 1891; the Stamp Duties Management Act, 1891; the Municipal Corporations Act, 1882; the Poor Law Act, 1930; the Law of Property Act, 1925; the County Courts Act, 1934; the Post Office Act, 1908; the Companies (Consolidation) Act, 1908; the Licensing (Consolidation) Act, 1910; the Companies Acts, 1929, 1948; the Supreme Court of Judicature (Consolidation) Act, 1925; the Limitation Act, 1939; the Agricultural Holdings Act, 1948.

(l) The revision of the statutes of Canada brought into force by Royal Proclamation in March, 1887, though in form repealing the Acts consolidated, was held in reality to preserve them in unbroken continuity; and as a consequence of this rule it was held that the adoption by municipalities of the Canada Temperance Act prior to the revision was not changed or interfered with by the revision, the alterations in the phraseology of the revising Act being verbal only, and not materially changing its character: *Frontenac Licence Commissioners v. Frontenac County* (1887), 14 Ont. Rep. 741, 745, Boyd, C. *Fullum v. Waldie Bros.* (1909), 130 W. R. 236, 244.

(m) Of this the Coroners and Sheriffs Acts of 1887 and the Merchant Shipping Act, 1894, are good examples.

(n) *Williams v. Permanent Trustee Co. of N. S. W.*, [1906] A. C. 248, 253; and see *Wakanui Road District v. Hampstead Town Board* (1907), 27 N. Z. L. R. 469, as to the effect of new amendments inserted in a compilation Act.

Act was intended to alter the common law. In *Nolan v. Clifford* (o), speaking of the Crimes Act, 1900 (No. 40), of New South Wales, Griffith, C.J., said: "This is described to be an Act to consolidate the statutes relating to criminal law. There is nothing to indicate that the Legislature intended to make any substantial alteration in the law. It is intitled an Act to consolidate the statutes. There is nothing to suggest that they intended to make an important alteration in the common law on a matter materially affecting the liberty of the subject." And Barton, J., in concurring, added: "By the construction we are now placing on it (section 9 of the Act), the ordinary purpose of a consolidating Act is preserved, and it will not be wrested from its declared objects and applied to others, by which process an amendment would be placed in a statute where the public and the profession would not be in the least degree on their guard to look out for it" (p).

(2) Decisions on the older enactments are usually accepted as conclusive (q) in the construction of the substituted section in the later Act, even, it would seem, although the words would, if used for the first time in the substituted section of the later Act, presumably bear another sense (r). The duty of every man under section 8 of the Sheriffs Act, 1887, to be ready and apparelled to follow the sheriff and take felons at the cry of the county would, it is submitted, be read by the construction, if any, put on it in past times. This rule may also be equally well expressed by saying that the repealed enactments are to be dealt with as being *in pari materia* with the corresponding section of the later Act. It is recognised in section 38 (1) of the Interpretation Act, 1889, (s), by the provision that, unless a contrary intention appears, when an Act passed after 1889 repeals and reproduces, with or without modification, any provisions of a former Act, references in any other Act to the provisions thus repealed are to be read as references to the provisions thus re-enacted (t). In *Re Budgett* (u), Chitty, J., had to

(o) (1904), 1 Australia C. L. R. 429, 445, 452; *Nottinghamshire C. C. v. Middlesex C. C.*, [1936] 1 K. B. 141, 145, Lord Hewart, C.J.

(p) And see p. 309, *ante*. As to displacement of the presumption, see *MacConnell v. Prill & Co., Ltd.*, [1916] 2 Ch. 57; *Gilbert v. Gilbert and Boucher*, [1928] P. 1, 8 (C. A.).

(q) See p. 161, *ante*; *Mitchell v. Simpson* (1890), 25 Q. B. D. 183, 188. See also *Clarkson v. Musgrave* (1881), 9 Q. B. D. 386; approved in *Smith v. Baker*, [1891] A. C. 325, 349. As to the Ontario statutes, *Nicholls v. Cumming* (1877), 1 Canada 395, 420, Richards, C.J., 425, Strong, J.; *Crain v. Ottawa Collegiate Institute* (1878), 43 U. C. Q. B. 498, 501, Harrison, C.J. The Consolidated Statutes of the Dominion of Canada are read as one great Act: *Boston v. Lelièvre* (1870), L. R. 3 P. C. 157, 162.

(r) This rule, it is submitted, should not be applied where the superseded Act has received different constructions, *e.g.*, in different provinces of Canada, or in different parts of the United Kingdom: see *Davidson v. Ross* (1876), 24 Upp. Can. Ch. 22, 79, Patteson, J. "If we knew that the Act had received the same construction in each Province the rule might well be involved."

(s) *Post*, Appendix B.

(t) It is submitted that this section does not apply where the only reference to another statute is in a section repealing or amending its provisions. It applies where, for the purpose of understanding the enactment containing the reference, it is necessary to read in the provision of the enactments referred to. See *Bennett v. Minister for Public Works* (1908), 7 Austr. C. L. R. 372, 377, Griffith, C.J.

(u) [1894] 2 Ch. 557, 561.

construe section 40 of the Bankruptcy Act, 1883, and said: "I have here to deal not with an Act of Parliament codifying the law, but with an Act to amend and consolidate the law, and therefore it is, I say, these observations (x) do not apply; and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature." And he then proceeded to examine the course of decisions and legislation with respect to the distribution of joint and separate estates since *Ex p. Cook* in 1728 (y). In *Brown v. M'Lachlan* (z), the Judicial Committee had to interpret a South Australian statute, which professed to repeal a former statute of limited operation, and to re-enact its provisions in an amended form. In order to ascertain the intention of the Legislature, their Lordships examined the history of the land legislation of the colony, to see whether there was anything therein to rebut the presumption that it had not been meant in a statute of the kind to extend the amended provisions to classes of persons not within the repealed Act. But the Court has no authority to take a consolidating Act to pieces and rearrange the sections so as to produce an effect which on the face of the Act as it stands does not seem to have been intended (a). Where a local Act to amend the constitution of, and to consolidate, amend and extend the statutory powers of the Conservators of the River Thames (57 & 58 Vict. c. clxxxvii), contained in section 289 a clause exempting from rates and taxes, combining clauses on the same subject in Acts of 1788 and 1814, it was held that the new section must be treated not as consolidating former enactments, but as enacting new law (b).

(3) Statutes not expressly repealed continue in force without modification, except so far as stated in the provision last set forth.

Codification Acts.

7. Acts codifying the law, so far as they embody statute law, are subject to the same rules as consolidation Acts. So far as they embody the rules of equity, common law, or the law merchant, they must be construed with reference to the rules laid down in the last chapter, subject to the observations of Lord Herschell in *Bank of England v. Vagliano* (c), which turned upon the Bills of Exchange Act, 1882, the first modern Act which can be said to have the qualities of a code. The learned Lord, in discussing the opinions of the Court of Appeal,

(x) The observations of Lord Herschell in *Vagliano's Case*, quoted p. 336 *post*.

(y) (1728), 2 P. Wms. 500.

(z) (1872), L. R. 4 P. C. 543, 550.

(a) *Administrator-General of Bengal v. Prem Lal Mullick* (1895), L. R. 22 Ind. App. 107, 116, Lord Watson; *Williams v. Permanent Trustee Co. of N. S. W. Ltd.*, [1906] A. C. 248, 253.

(b) *Stewart v. Thames Conservancy*, [1908] 1 K. B. 893, 903, Bray, J. Cf. *Bristol Tramways v. Fiat Motors Ltd.*, [1910] 2 K. B. 831, 836, Cozens-Hardy, M.R.; *MacConnell v. Prill (E.) & Co. Ltd.*, [1916] 2 Ch. 57, 63.

(c) [1891] A. C. 107, 144, 145.

said: "The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned Judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer only when the acceptor was aware of the circumstance that the payee was a fictitious person, and, further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned Judges that if the exception was to be further extended it would rest upon no principle, and that they might well pause before holding that section 7 (3) of the statute was 'intended, not merely to codify the existing law, but to alter it, and to introduce so remarkable and unintelligible a change.' With sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am, of course, far from asserting that recourse may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely. They, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground. One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange

Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter, it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment." This opinion does not apply to consolidation Acts (*d*), but has been accepted as applicable to codifying Acts such as the Bills of Exchange Act, 1882, the Partnership Act, 1890, the Sale of Goods Acts, 1893 (*e*), the Marine Insurance Act, 1906, and to Indian (*f*) and colonial (*g*) codes.

The Marine Insurance Act, 1906, though expressed by its title to be "An Act to codify the Law relating to Marine Insurance," has been held to have altered the law (*h*). A curious position arose on the question whether the value of a wreck was to be taken into account in a constructive total loss. The Court of Appeal in 1903 said "No" (*i*). The House of Lords overruled this decision and held that "the value of the ship where she lies must enter into the calculation. And this test has been laid down repeatedly by many high authorities over a long period of time. I think it was too late to disturb it in 1903" (*k*). The Act of 1906 was enacted before the Court of Appeal was overruled. In 1912 it was held (*l*) that the common law as laid down by the House of Lords in *Macbeth & Co. v. Maritime Insurance Co.* (*k*) had been altered by section 60 (2) (ii) of the Marine Insurance Act, 1906, by codifying it in accordance with the erroneous decision of the Court of Appeal. In *Sanday's Case* (*m*) Lord Wrenbury, speaking with reference to the Marine Insurance Act, 1906, said: "I should look more carefully in a codifying Act to see whether any existing law is altered by express words, and should not hold that the Act is going beyond codification unless it puts the matter beyond dispute."

Implied repeals.

8. Where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier (*n*). The Court leans against implying a repeal, "unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation

(*d*) See p. 332, *ante*.

(*e*) See *Abbot v. Wolsey*, [1895] 2 Q. B. 97; *Bristol Tramways Co. v. Fiat Motors, Ltd.*, [1910] 2 K. B. 831, 836.

(*f*) See *Norenda Nath Sircar v. Kamalbasini Dasi* (1896), L. R. 23 Ind. App. 18.

(*g*) *Robinson v. Canadian Pacific Ry.*, [1892] A. C. 481.

(*h*) *E.g.*, in section 60 the test of "unlikelihood of recovery" has been substituted for "uncertainty of recovery"; *Polurian S.S. Co. v. Young*, [1915] 1 K. B. 922.

(*i*) *Angel v. Merchants' Marine Insurance Co.*, [1903] 1 K. B. 811.

(*k*) [1908] A. C. 144, *per* Lord Loreburn, L.C., at p. 148.

(*l*) *Hall v. Hayman*, [1912] 2 K. B. 5, 14.

(*m*) *British and Foreign Marine Insurance Co. v. Samuel Sanday*, [1916] 1 A. C. 650, 673.

(*n*) *Paine v. Slater* (1883), 11 Q. B. D. 120.

or unless there is a necessary inconsistency in the two Acts standing together" (o). "The latest expression of the will of Parliament must always prevail" (p). It does not matter whether the earlier or the later enactment is public, local and personal, or private (q), or is penal or deals with civil rights only (r), and the rule is equally applicable to Orders in Council or rules of Court if they have statutory force and are made under authority empowering the rule-makers to supersede prior enactments as to procedure (s). Before coming to the conclusion that there is a repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the later, imply the repeal of an express prior enactment—i.e., the repeal must, if not express, flow from necessary implication (t). Thus in *Ellen Street Estates v. Minister of Health* (u) the Court of Appeal held that section 46 of the Housing Act, 1925, so far as it was inconsistent with the similar Act of 1919 had impliedly repealed the latter Act, although the Act of 1925 provided that compensation was to be assessed in accordance with the 1919 Act. And in *The Dart* (w), the Court of Appeal held that section 45 of the Supreme Court of Judicature Act, 1873, as to appeals from county courts, was impliedly repealed by section 10 of the County Courts Act, 1875,

(o) *Kutner v. Phillips*, [1891] 2 Q. B. 267, 272, A. L. Smith, J., quoted with approval in *Aberdeen Suburban Tramway Co. v. Aberdeen Corpn.*, 1927 S. C. 683; *Re Berrey*, [1936] Ch. 274; *Re Chance* [1936] 1 Ch. 266, 270.

(p) *Goodwin v. Phillips* (1907), 7 Austr. C. L. R. 1, 7, 9, 16.

(q) See Part IV, ch. ii, *post*; and *Re West Devon Consols Mining Co.* (1888), 38 Ch. D. 51.

(r) *Goodwin v. Phillips*, *supra*, at p. 7, Griffiths, C.J.

(s) See p. 293, *ante*; *Goodwin v. Phillips*, *supra*, at p. 16. The County Courts Admiralty Jurisdiction Act, 1868, s. 9, was held to have been impliedly repealed by R. S. C., Ord. LIV, r. 1; *Rockett v. Clippindale*, [1891] 2 Q. B. 293. And in *The Delano*, [1895] P. 40, it was held that ss. 26, 31 of the same Act were impliedly repealed in part as to appeals by s. 120 of the County Courts Act, 1888. But in *The Tynwald*, [1895] P. 142, it was held that an exception in s. 10 of the Act of 1868 limited the general terms of s. 101 of the Act of 1888; and see *The Theodora*, [1897] P. 279, 284. So Order LV was held to repeal the Limitation Act, 1623, as to costs in slander; *Garnett v. Bradley* (1878), 3 App. Cas. 944. In *R. v. Secretary of State for Home Affairs, ex p. O'Brien*, [1923] 2 K. B. 361, it was held that an internment ordered by the Home Secretary purporting to act under Reg. 14 B (an Order in Council deriving its authority from the Restoration of Order in Ireland Act, 1920) was illegal because, even if such internment would have been valid before the passing of the Irish Free State Constitution Act, 1922, since that Act the machinery of government in Ireland was such as to be quite inconsistent with the continued exercise by the Home Secretary of his previous powers under Reg. 14 B.

(t) *White v. Islington Corporation*, [1909] 1 K. B. 133, where it was held that the portion of s. 7 of the Representation of the People Act, 1867, which provided for the rating of owners of houses wholly let out in apartments was not repealed by implication by the Poor Rate Assessment and Collection Act, 1869; see now Local Government Act, 1948, s. 57. See also *Thames Conservators v. Hall* (1868), L. R. 3 C. P. 415, Byles and Keating, JJ.; *Kutner v. Phillips*, [1891] 2 Q. B. 267, 271, A. L. Smith, J.; *West Ham Churchwardens v. Fourth City Mutual Building Society*, [1892] 2 Q. B. 655, 658, A. L. Smith, J. As to Canada, see *Grand Trunk Ry. v. Robertson* (1907), 39 Canada 506, 518; [1909] A. C. 325, applied in *Re Constitutional Questions Determination Act*, [1946] 1 D. L. R. 638.

(u) [1934] 1 K. B. 590.

(w) [1893] P. 33.

which came into operation on the day after the Act of 1873, and that the subsequent repeal of the 1875 Act by section 188 of the County Courts Act, 1888, did not revive the repealed provisions of the Act of 1873. But where the terms of a later enactment, taken in their primary meaning, are wide enough to abrogate a prior enactment, they will be read as repealing it, unless it is fairly open to hold on the words of the later Act that an intention is manifested to cut down or restrict the primary meaning. If there is a repugnancy between two Acts passed in the same year the later chapter of the statutes for that year prevails, and the earlier is treated as impliedly repealed (x).

To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinise the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. An Act of 1540, 32 Hen. 8, c. 9, s. 2 (y), imposed a penalty on the sale of pretended titles. Section 6 of the Real Property Act, 1845, permitted the sale of rights of entry. The Court of Appeal held in *Jenkins v. Jones* (z) that before the enactment of that section a right of entry fell within the meaning of a pretended title in the earlier Act, and that the effect of the subsequent Act was, not to repeal the earlier, but to restrict its application—a distinction which might have been better expressed by saying that the earlier enactment was repealed in part. In *Re Douglas* (a) it was held that the general provisions contained in section 7 of the Mortmain, etc. Act, 1891, impliedly repealed the restrictions on the amount to be given to churches imposed by the Gifts for Churches Act, 1803. In *Re Smith's Estate* (b), Stirling, J., held that the Act of 1803 was not affected by the Married Women's Property Act, 1882.

Effect of affirmative enactments on each other.

9. Where a new Act is couched in general affirmative language, and the previous law can well stand with it, and if the language used in the later Act is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together (c). Thus an Act authorising trial by Quarter Sessions can stand with an earlier Act which enacted that the offence should be tried by the Queen's Bench or at Assizes (d). And the 38 & 39 Vict. c. 94, s. 4, which made carnally knowing a girl over 12 and

(x) *British Columbia Electric Ry. v. Stewart*, [1913] A. C. 816; *Moore v. Robinson* (1831), 2 B. & Ad. 817, 821, and cf. p. 43, *ante*.

(y) S. 2 was repealed *in toto* by the Land Transfer Act, 1897, s. 11.

(z) (1882), 9 Q. B. D. 128.

(a) [1905] 1 Ch. 279.

(b) (1887), 35 Ch. D. 589.

(c) Generally statutes in the affirmative do not repeal a precedent affirmative statute: *Dr. Foster's Case* (1614), 11 Co. Rep. 56 b. But if the later is contrary to the earlier statute, it amounts to a repeal of the earlier: *Owen v. Saunders* (1696), 1 Lord Raymond, 158, 160. Cf. Maxwell, 9th ed., 177.

(d) *Muir v. Hore* (1877), 47 L. J. M. C. 17.

under 13 with or without consent a misdemeanour, does not prevent a conviction for felony (rape) under 24 & 25 Vict. c. 100, s. 48, on a girl between those ages (e). The rule as to repeal of a statute by a subsequent inconsistent statute is equally applicable to bylaws (f). However, general affirmative words of the new law would not of themselves repeal the old (g). As Lord Clare said in *Hayden v. Carroll* (h), “the two statutes will be considered as forming two distinct codes, and certainly may stand together” (i). This rule was fully discussed in *Dr. Foster’s Case* (k). In that case a *qui tam* action was brought against Dr. Foster under sections 5 and 11 of 23 Eliz. c. 1, for not attending divine service. To this Dr. Foster pleaded that the Act sued on was virtually repealed by either of two other statutes of Elizabeth, which both gave further and additional penalties for non-attendance at church, without expressly taking away the *qui tam* action. As to this plea the Court said, first, that the purpose of the earlier pleaded Act was not to oust the former statute, but to oust delay. Secondly, that the later pleaded Act was all in the affirmative, and therefore would not repeal or abrogate a previous affirmative law.

But where affirmative words in a later Act are, as was said in *Stradling v. Morgan* (l), such as necessarily import a contradiction—that is to say, where it is clear that it must have been intended that the earlier and later enactments should be in conflict—the two cannot stand together, and the second repeals the first (m). And in construing affirmative words, as was said by Grove, J., in *Ryhope Colliery Co. v. Foyer* (n), “it is difficult to say what canon of construction should be applied to the phrase, when included in the later Act, ‘as far as these words are consistent with.’ Such words are easily written, but whether they conduce to clearness and the facility of administering justice may perhaps be open to argument.”

A negative statute may be affirmative with regard to another negative statute. A statute expressed in negative language may be affirmative with regard to some preceding statute also expressed in negative language, if both the statutes have been expressed in negative language for the purpose of limiting the operation of some third and earlier statute. By 3 & 4 Will. 4, c. 98, s. 7, it was enacted that “no bill of exchange not having more than three months to run shall be void by reason of any statute in force for the prevention of usury.” By 2 & 3 Vict. c. 37, s. 1, it was enacted that “no bill of exchange not having

(e) *R. v. Ratcliffe* (1882), 10 Q. B. D. 74. Cf. *Owens v. Jones* (1868), 37 L. J. Q. B. 159.

(f) See *Gosling v. Green*, [1893] 1 Q. B. 109, 112, Pollock, B.

(g) Lord Blackburn in *Garnett v. Bradley* (1878), 3 App. Cas. 944, where R. S. C. Order LV, was held to have repealed the statute 21 Jac. 1, c. 16, and where the chief cases on this subject are collected and discussed.

(h) (1796), 3 Ridgway, Parl. Cas. 545.

(i) Approved in *O’Flaherty v. M’Dowell* (1857), 6 H. L. C. 149, 162.

(k) (1614), 11 Co. Rep. 56 b.

(l) (1560), Plowd. 199.

(m) *Garnett v. Bradley*, *supra*, at p. 965, Lord Blackburn.

(n) (1880), 7 Q. B. D. 485, 492.

more than twelve months to run shall be void by reason of any statute in force for the prevention of usury." It was held that the former statute was not repealed by the latter (o). As to these two statutes, Turner, L.J., said, in *Ex p. Warrington* (p): "It was argued that the statute [of William] was repealed, or, as it is termed in some of the cases, 'absorbed,' by the statute of Victoria, and it is true that the latter statute, extending to all bills payable within twelve months, includes within its provisions the bills payable within three months which are mentioned in the former statute, but it does not, in my opinion, follow that the former statute is repealed or absorbed by the latter. . . . These statutes, though expressed in the negative, are so expressed only on account of the proviso in the statute of [13] Anne [c. 15, against usury]. They are in the negative as to that statute, but *inter se* they are affirmative statutes, and I take the rule of law to be that an affirmative statute is not, without express words, repealed by a subsequent affirmative statute unless the two statutes cannot stand together."

New statutory remedies, when exclusive. In *R. v. Judge of Essex County Court* (q), Esher, M.R., laid it down as an ordinary rule of construction, that "where the Legislature has passed a new statute giving a new remedy, that remedy alone can be followed." But the phrase "new" as applied to a statute is either needless or ambiguous. The old distinction between *vetera* and *nova statuta* (r) is obsolete; and "new" is insensible unless applied to statutes creating rights or remedies unknown to the common law or to previous enactments. And for modern application the rule could perhaps be more accurately laid down thus: In the case of an Act which creates a new jurisdiction, a new procedure, new forms, or new remedies, the procedure, forms, or remedies there prescribed, and no others, must be followed until altered by subsequent legislation (s).

As Lord Atkin (then L.J.) said in *Phillips v. Britannia Hygienic Laundry Co.* (t): "One question to be considered is, Does the Act contain a reference to the remedy for the breach of it? *Prima facie*, if it does, that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides the penalty, the duty is nevertheless owed to individuals."

With this must be contrasted the rule embodied in many statutes, and now made general by section 33 of the Interpretation Act, 1889 (u), and applied to all statutes, whether general, local, or personal,

(o) *Clack v. Sainsbury* (1857), 11 C. B. 695.

(p) (1853), 22 L. J. Bank. 33, 39.

(q) (1887) 18 Q. B. D. 704, 707.

(r) See p. 52, *ante*.

(s) *R. v. Judge of Essex County Court*, *supra*, at pp. 707, 708; cf. Willes, J., in *Wolverhampton New Waterworks v. Hawkesford* (1859), 6 C. B. (N.S.) 336 at pp. 356, 357.

(t) [1923] 2 K. B. 832 at p. 841.

(u) *Post*, Appendix B.

whether public or private (section 39), that when an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether such Act was passed before or after January 1, 1890, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence (x). This enactment makes a penalty imposed by any statute presumably alternative, but not, as it is sometimes described, cumulative, inasmuch as the offender cannot be made to suffer the penalties imposed by common law *and* the statute, and would be entitled to plead *autrefois acquit* or *convict* if tried at separate times under the common law and the statute or under the two statutes.

The intention of the section of the Interpretation Act was, by laying down a general rule, to avoid the necessity of inserting a particular provision to take effect in each new statute dealing with offences. But its effect is rather to relieve the draftsman than the interpreter of the statute, for the Judge will still in each case have to consider the whole statute in search of any sign of the contrary intention as stated by Lord Atkin above.

Many statutes contain clauses similar in effect to the general rule, but without the confusing words as to contrary intention. These statutes, of some of which a list is given below, seem not to be affected by the above rule, save so far as it enables the revisers of the Statute-book to excise the particular clauses (y).

New statutory penalties, when alternative. In accordance with this rule, penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as repealing the penalty to which the offender was previously liable. In *Middleton v. Crofts* (z), Lord Hardwicke said: "Subsequent Acts of Parliament in the affirmative, giving new penalties and instituting new modes of proceeding, do not repeal former methods and penalties ordained by preceding Acts without negative words." "If, however," as Lord Campbell said in *Michell v. Brown* (a), "a later statute again describes an offence which had been previously created by a former statute, and affixes a different punishment to it, varying the procedure, and giving an appeal where there was no appeal before, we think the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence as by making it a misdemeanour instead of a felony, or a felony instead of a misdemeanour, the offence could not be

(x) See pp. 214, 315, *ante*; and Part iii, c. ii, *post*.

(y) 11 Geo. 2, c. 22, s. 4; 18 Geo. 2, c. 30, ss. 2, 3; 36 Geo. 3, c. 9, s. 6; 37 Geo. 3, c. 70, s. 3; 37 Geo. 3, c. 123, s. 7; 52 Geo. 3, c. 104, s. 8; 52 Geo. 3, c. 156, s. 4; 57 Geo. 3, c. 6, s. 5; 60 Geo. 3 & 1 Geo. 4, c. 1, s. 4; 32 & 33 Vict. c. 62, s. 23; 52 & 53 Vict. c. 52, s. 9; 52 & 53 Vict. c. 69, s. 3.

(z) (1736), 2 Atk. 650, 674.

(a) (1859), 28 L. J. M. C. 53, 55, 56.

proceeded with under the earlier statute and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution and not cumulatively. . . .” “If,” said Lord Abinger in *Henderson v. Sherborne* (b), “a crime be created by statute with a given penalty, and be afterwards repeated in another statute with a lesser penalty attached to it, a person ought not to be held liable to both. There may, no doubt, be two remedies for the same act, but they must be of a different nature”: and “where the same offence is re-enacted with a different punishment it (the subsequent enactment) repeals the former law” (c). This view was adopted after full consideration in *Fortescue v. Bethnal Green Vestry* (d). There section 129 of the Metropolis Management Act, 1855, as to obstructions on the footway, was held inconsistent with and to impliedly repeal section 72 of Michael Angelo Taylor’s Act (57 Geo. 3, c. xxix) under which the appellant had been convicted. Consequently, proceedings had been instituted under the wrong Act.

With reference to Acts not creating offences the rule seems somewhat different. It is suggested by Lord Bramwell in *Mews v. R.* (e) that where a prior Act provides for one mode of paying an expense, and a subsequent Act provides a different mode of paying the same expense, the later abrogates the earlier Act, and the Courts will not hold the two Acts to be alternative. But this rule cannot be adopted without qualification. If the later Act puts the expense upon a different public fund from that selected by the earlier Act, an inconsistency may be justly inferred; but when one Act saddles an individual and another a public fund, the two Acts can stand together; e.g., in the case of costs (f).

Contrariety between statutes.

10. As already stated (g) when two statutes, although both are expressed in affirmative language, are contrary in matter, the latter abrogates the former (h). “The said rule that *leges posteriores priores*

(b) (1837), 2 M. & W. 236, 239.

(c) *Att.-Gen. v. Lockwood* (1842), 9 M. & W. 378, 391, Lord Abinger; *R. v. Cator* (1802), 4 Burr. 2026.

(d) [1891] 2 Q. B. 170, 178. Cf. *Youle v. Mappin* (1861), 30 L. J. M. C. 234, 237; *Goodwin v. Phillips* (1907), 7 Austr. C. L. R. 1, 7, Griffiths, C.J.; *Summers v. Holborn B. W.*, [1893] 1 Q. B. 612; *Smith v. Benabo*, [1937] 1 K. B. 518.

(e) (1882), 8 App. Cas. 339, 350.

(f) The Costs in Criminal Cases Act, 1908, definitely provides that in England the power to order payment of costs by the prosecutor or the person convicted of an indictable offence, is additional to the power to order payment of the costs out of local funds. See s. 6 (4).

(g) See p. 337, *ante*.

(h) *Quære* whether this is true with regard to two sections of the same statute. “How can we say,” said Jervis, C.J., in *Castrique v. Page* (1853), 13 C. B. 458, 461, that the “one provision is repealed by the other when both received the royal assent at the same moment?” *Contra*, *Wilberforce on Statute Law*, 293; and see *Sheffield Corporation v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

contrarias abrogant, was well agreed, but as to this purpose *contrarium est multiplex*. 1. In quality *scil.* if one is an express and material negative, and the last is an express and material affirmative, or if the first is affirmative and the latter negative. 2. In matter, although both are affirmative, as by the statute of 33 Hen. 8, c. 23, it is enacted that ‘if any person being examined before the King’s Council . . . shall confess any treason . . . he shall be tried in any county where the King pleases, by his commission, etc.’; and afterwards another law was made (1 & 2 Ph. & Mar. c. 10) in these words: ‘That all trials hereafter to be had for any treason, shall be had according to the course of the common law, and not otherwise’: this latter Act (although the latter words had not been) hath abrogated the former, because they are contrary in matter; but it doth not abrogate the statute of 35 Hen. 8, c. 2, of trial of treason beyond the seas, notwithstanding the negative words, because it was not contrary in matter, for that was not triable by the common law” (i). This passage was quoted and approved by Lord Blackburn in *Garnett v. Bradley* (k).

This rule is often difficult to apply, because the question always arises whether the two statutes are actually or only apparently inconsistent with one another. “I do not think,” said Grove, J., in *Hill v. Hall* (l), “that a mere accidental inconsistency between two statutes amounts to a total repeal of the earlier; such a doctrine might be pushed to a mischievous extent.” “What words,” said Dr. Lushington in *The India* (m), “will establish a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so, on the other hand, it is not necessary that any express reference be made to the statute which it is intended to repeal. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provision in the prior statutes could not have been intended to subsist, and yet, if it were left subsisting, no palpable absurdity would have been occasioned.” It must therefore always be a question for the Court to decide whether this second rule as to intention is applicable or not, and in coming to a decision on this point, repeal by implication is never to be favoured (n). “We ought not to hold a sufficient Act

(i) *Dr. Foster’s Case* (1614), 11 Co. Rep. 56b, 62b.

(k) (1878), 3 App. Cas. 944, 965.

(l) (1876), 1 Ex. D. 411, 414.

(m) (1864), 33 L. J. Adm. 193.

(n) *Dobbs v. Grand Junction Waterworks* (1882), 9 Q. B. D. 158; (1883), 9 App. Cas. 49, 54, 58; and cf. *Crocker v. Knight*, [1892] 1 Q. B. 702.

repealed, not expressly as it might have been, but by implication, without some strong reason" (o). So in *Flannagan v. Shaw* (p), the Court of Appeal held that section 18 of the Distress for Rent Act, 1737, was not repealed by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, as the earlier section was not inconsistent with the later. However, "every Act must be considered with reference to the state of the law when it came into operation. Every Act is made either for the purpose of making a change in the law or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment" (q).

(i) *Repeal of general enactment by particular enactment.* From this rule it follows that if one statute enacts something in general terms, and afterwards another statute is passed on the same subject, which, although expressed in affirmative language, introduces special conditions and restrictions, the subsequent statute will usually be considered as repealing by implication the former, for "affirmative statutes introductive of a new law do imply a negative" (r). Thus, in *Ex p. Carruthers* (s), it appeared that 13 Geo. 2, c. 28, s. 5, exempted from impressment any harpooner or seaman in the Greenland trade, but 26 Geo. 3, c. 41, s. 17, enacted that "no harpooner whose name shall be inserted in a list shall be impressed," and it was held that this subsequent statute, by requiring something special to be done, repealed by implication the general provisions of the former statute. So in *R. v. Justices of Worcester* (t), it was held that section 6 of the Poor Relief Act, 1601, which gave an appeal generally to quarter sessions as to overseers' accounts, was virtually repealed by 17 Geo. 2, c. 38, s. 4, which required the appeal to be made to the next quarter sessions after the accounts had been audited. And in *Owen v. Saunders* (u), it was held that 37 Hen. 8, c. 1, s. 3, by which the *custos rotulorum* might grant the clerkship of the peace *durante bene placito*, was virtually repealed by 1 Will. & Mar. sess. 1, c. 21, s. 5, by which it was enacted that it must be granted for life, because a grant *quamdiu se bene gesserit* was contrary to a grant *durante bene placito*. As a modern instance of this rule, the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, s. 55 (2)), provided that an order of a Court of Summary Jurisdiction should in a certain case "be final and conclusive." It was held that the justices had no power to state a special case for the opinion of the High Court under the Summary Jurisdiction Act of 1879, s. 33 (x).

(o) *G. W. Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. 787, 809, Lord Bramwell. Cf. *Kutner v. Phillips*, [1891] 2 Q. B. 267, 272.

(p) [1920] 3 K. B. 96.

(q) *Ely (Dean of) v. Bliss* (1852), 5 Beav. 574, 582, per Lord Langdale, M.R.

(r) *Harcourt v. Fox* (1693), 1 Show. 506, 520, 532.

(s) (1807), 9 East 44; approved by Scrutton, L.J., in *Ellen Street Estates v. Minister of Health*, [1934] 1 K. B. 590, 596.

(t) (1816), 5 M. & S. 457.

(u) (1696), 1 Lord Raym. 159.

(x) *Hall v. Arnold*, [1950] 2 K. B. 543, D. C.

In certain cases "special" (or private) Acts are held impliedly to repeal the general law. Thus, an authority to place a railway station on a particular site has been held to override the enactments relating to the general line of buildings in a public Act (y). But the extent to which special Acts are held to override the general law or create exceptions depends on the particular terms of the statutes in question (z).

Repeal by statutory rules. In *Wandsworth D. B. W. v. Pretty* (a), it was held that certain police regulations made under the Metropolitan Streets Act Amendment Act, 1867, did not impliedly repeal section 60 (7) of the Metropolitan Police Act, 1839, as to nuisances caused by exposing goods on the footway of streets (b). On the other hand in *Garnett v. Bradley* (c) Order LV of the R. S. C. was held to overrule the Limitation Act, 1623, as to costs in actions of slander.

Curtailment without repeal. If a subsequent statute merely creates an exemption or exception from the operation of a previous statute, or "modifies its operation by the annexation of a condition" (d), the previous statute is not necessarily repealed. And prior enactments may be rendered inoperative without being actually repealed. Thus, the priority given by section 14 of the Trustee Savings Bank Act, 1863, was taken away by section 40 of the Bankruptcy Act, 1883, although the prior Act was not repealed, inasmuch as subsequent legislation had rendered the prior enactment inapplicable in cases where the estate of an officer of a savings bank within the earlier Act was being administered in bankruptcy or in an administration action in the Chancery Division (e). In other words, a general enactment is *pro tanto* avoided by an express enactment entirely inconsistent with it. By 29 Eliz. c. 4, certain penalties were imposed upon sheriffs who took larger fees for executing a *fi. fa.* than were allowed by statute, but 7 Will. 4 & 1 Vict. c. 55 provided that certain larger fees might in future be taken by sheriffs if those fees were sanctioned by the Judges. It was argued in *Pilkington v. Cooke* (f) that the later Act repealed the earlier Act as being contrariant to it. It was held, however, that as the subsequent statute only gave a power to the Judges of allowing and thereby rendering lawful, an additional payment for executing a *fi. fa.*, which power the Judges might never exercise, it was wholly contingent in each case which arose whether the previous statute would be altered or abrogated in pursuance of the subsequent one. Consequently, the operation of the subsequent statute was not to repeal

(y) *City and South London Subway Co. v. London County Council*, [1891] 2 Q. B. 513; cf. *London County Council v. London School Board*, [1892] 2 Q. B. 606; *Argyll (Duke) v. I. R. C.* (1913), 30 T. L. R. 48.

(z) *Uckfield U. D. C. v. Crowborough District Water Co.*, [1899] 2 Q. B. 664; *L. C. C. v. Wandsworth and Putney Gas Co.* (1900), 82 L. T. 562.

(a) [1899] 1 Q. B. 1.

(b) And see p. 293, *ante*.

(c) (1878), 3 App. Cas. 944.

(d) *Mount v. Taylor* (1868), L. R. 3 C. P. 645, 654, Montague Smith, J.

(e) *Re Williams* (1887), 36 Ch. D. 573, 577, North, J.; but see now Bankruptcy Act, 1914, s. 33 (9).

(f) (1847), 16 M. & W. 615.

the previous one, but merely to constitute an exemption from it in those cases in which the Judges exercised the power given to them. So in *Mount v. Taylor* (g) it was argued that the Statute of Gloucester, which gave the plaintiff a right to recover costs if he obtained any damages, was impliedly repealed by the County Courts Acts, which enact that under certain circumstances a successful plaintiff shall not recover costs. "But," said Bovill, C.J., "on a careful consideration of the County Courts Acts it seems to me that they do not amount to a repeal of the Statute of Gloucester within Lord Brougham's Act. The Statute of Gloucester is the foundation of the plaintiff's right to costs, and the County Courts Acts merely superadd conditions to the plaintiff's right to them in certain cases, and if the operation of those statutes be only to superadd certain conditions and another statute takes away those conditions or substitutes other conditions, the original statute in my opinion remains in force." In commenting on this case, Hannen, J., in *Mirfin v. Attwood* (h), put the rule of law as follows: "To impose a condition on a class of plaintiffs before they shall be entitled to the benefit of a statute is not a repeal of that statute as to them, and it is only by a figure of speech that it can be so described; it merely in specified cases intercepts the operation of the statute, which statute remains in existence and unrepealed notwithstanding."

So, too, in *Luby v. Warwickshire Miners' Association* (i), Neville, J., held that, although modern trade unions having branches and appointing delegates came within the scope of certain Acts of George III which declared societies of that kind to be unlawful combinations, and although trade unions were not expressly exempted from those Acts by any subsequent legislation, as their existence had been recognised by the Legislature in the Acts relating to trade unions, they must be deemed to be impliedly exempt from the Acts of George III. "There is no express provision," said the learned Judge, "in the Acts dealing with trade unions that the statutes of George III shall not apply, but inasmuch as the manner in which Parliament has dealt with them is quite inconsistent with their criminality, I think such a provision must of necessity be implied."

Repeal not implied from bare recitals or scheduled forms. If the later Act contains nothing else contrariant to an earlier Act except a mere recital in the later Act, this "is not sufficient to repeal the positive provisions of a former statute without a clause of repeal" (j).

(g) *Pilkington v. Cooke* (1847), 16 M. & W. 615, at p. 650.

(h) (1869), L. R. 4 Q. B. 330, 340. Hannen, J., differed from the majority of the Court, Lush and Hayes, JJ., who held that in certain cases the Statute of Gloucester was repealed by the County Courts Acts, and that having been once repealed by those Acts, it remained repealed by virtue of Lord Brougham's Act (13 & 14 Vict. c. 21), s. 5, notwithstanding the repeal of the repealing Acts. It is now wholly repealed.

(i) [1912] 2 Ch. 371, 380.

(j) *Dore v. Gray* (1788), 2 T. R. 358, Ashhurst, J.; *Port of London Authority v. Canvey Island Commissioners*, [1932] 1 Ch. 446, 492, Lawrence, L.J.

And “it would be giving too much effect to the loose words in a schedule if we were to decide that they had repealed the positive directions of a previous Act” (k).

Intention to be regarded rather than grammar. Even if a subsequent statute, taken strictly and grammatically, is contrary to a previous statute, yet if at the same time the intention of the Legislature is apparent that the previous statute should not be repealed, it has been in several cases held that the previous statute is to remain unaffected by the subsequent one. Thus, in *Brooke Abr. tit. Parliament*, 52, is this passage: “Where a statute is that the merchant shall import bullion of two marks for every sack of wool exported, and then another statute was made that the merchant should not be charged unless for the ancient custom only, this does not repeal the first statute.” So in *Williams v. Pritchard* (l), where houses built on land embanked from the Thames in pursuance of 7 Geo. 3, c. 37, were by that Act declared to be vested in the owners of the adjoining ground *free from all taxes and assessments whatsoever*, the question arose whether that enactment exempted such houses from a land-tax imposed by a subsequent Act, 27 Geo. 3, c. 5. The Court, in holding that such houses were exempted by 7 Geo. 3, c. 37, said as follows: “It cannot be contended that a subsequent Act will not control the provisions of a prior statute if it were intended to have that operation, but there are several cases in the books to show that where the intention of the Legislature was apparent that the subsequent Act should not have such an operation, there, even though the words of the statute, taken strictly and grammatically, would repeal a former Act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction” (m). And in *Fox v. Pett* (n), it was held that there was nothing in the Local Government Act, 1894, to show an intention to interfere with the Tithe Act, 1860. In *Duke of Argyll v. Commissioners of Inland Revenue* (o), a special Act of 1871 provided for an annuity for the Duke free of all taxes. Section 187 of the Income Tax Act, 1842, enacted that any future Act of Parliament which contained an exemption from taxes should not include income tax. The Court held the two Acts of 1842 and 1871 inconsistent and that the later Act must prevail.

(ii) *Repeal of special by general enactment. Generalia specialibus non derogant.* The general rule, that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent enactment is general, the rule of law being, as stated by Lord

(k) *Allen v. Flicker* (1839), 10 A. & E. 639, 642, Patteson, J.

(l) (1790), 4 T. R. 2, 3, Lord Kenyon, C.J.

(m) Adopted and applied in the *Sion College Case*, [1900] 2 Q. B. 581, 586, Channell, J.; affirmed, [1901] 1 K. B. 617. Where however the exemption was held to extend only to existing taxes and assessments or others substituted for them and not to a new consolidated rate.

(n) [1918] 2 K. B. 196.

(o) (1913), 109 L. T. 893.

Selborne in *Seward v. Vera Cruz* (p), "that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." "There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases on the subject will be found collected in the third edition of Maxwell on the Interpretation of Statutes" (q). The general maxim is, *Generalia specialibus non derogant*—i.e., general provisions will not abrogate special provisions (r). "When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms" (s).

In *Garnett v. Bradley* (t) after discussing and approving the opinion of Turner, L.J., upon the same subject, given in *Hawkins v. Gathercole* (u), Lord Hatherley put the rule thus: "An Act directed towards a special object or special class of objects will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made, directly or by necessary inference, to the preceding special Act" (x). Thus, in *R. v. Poor Law Commissioners* (y), it appeared that a local Act (59 Geo. 3, c. xxxix) vested in certain *ex officio* directors and forty other persons nominated by the vestry the powers of overseers of the poor. While the parish in question was under this Act the Poor Law Commissioners were empowered by section 39 of the Poor Law Amendment Act, 1834, to "direct that the administration of the laws for the relief of the poor of any single parish shall be governed and administered by a board of guardians," to be elected in a certain prescribed manner. It was argued, and ultimately held by the majority of the Court, that the local Act was not impliedly repealed by the subsequent public

(p) (1885), 10 App. Cas. 59, 68. See also *Blackpool Corporation v. Starr Estate*, [1922] 1 A. C. 27. *North Level Commissioners v. River Welland Catchment Board*, [1938] 1 Ch. 379; and *Harlow v. Minister of Transport*, [1950], 2 K. B. 175; reversed [1950] 2 K. B. 98.

(q) *Lancashire Asylums Board v. Manchester Corporation*, [1900] 1 Q. B. 458, 471, A. L. Smith, L.J. See Maxwell, 9th ed., pp. 183 *et seq.* and *Aberdeen Suburban Tramways Co. v. Aberdeen Magistrates*, [1927] S. C. 683—Ct. of Sess.

(r) Ilbert, p. 250.

(s) *Barker v. Edger*, [1898] A. C. 748, 754 (P. C.).

(t) (1878), 3 App. Cas. 944, 950.

(u) (1855), 6 De G. M. & G. 1.

(x) Cf. *Bristol Corporation v. Canning* (1906), 95 L. T. 183, *infra*; but see *Pollock v. Lands Improvement Co.* (1887), 37 Ch. D. 661; *Baird v. Mayor, etc. of Tunbridge Wells*, [1894] 2 Q. B. 867, 880 (A. L. Smith, L.J., thought the Act of 1739 was not a special Act within the meaning of the rule), *affd.*, [1896] A. C. 434.

(y) (1838), 6 A. & E. 1, 23.

Act. "The Court is urged to decide," said Patteson, J., referring to section 39 of the Act of 1834, "that from the generality of the expressions used in it, it applies to all parishes without any limitation, and that it necessarily gives an implied power to the Poor Law Commissioners to repeal at their will and pleasure all local Acts so far as they regard the administration of the Poor Laws. If the Legislature had intended to give so extensive a power to the Commissioners, it might reasonably have been expected that it would have done so in express terms. Even without express terms, if section 39 would be inoperative unless such construction were put upon it, the Court might be compelled to infer that such a power was implied. If, however, the section can be made fully effectual by a more limited construction, there can be no conclusive proof that the more extensive power was contemplated."

So in *Bristol Corporation v. Canning* (z) the words of Lord Selborne in *Seward v. Vera Cruz* quoted above were adopted and followed in holding that "the special rights of the commissioners of sewers to tax and assess are not, having regard to section 32 (5) (of the Bristol Corporation Act, 1901) to be assumed to be taken away by the general words of section 72 inasmuch as reasonable and sensible application can be given to section 72 without extending its meaning so as to include the commissioners." In *R. v. Minister of Health, ex p. Villiers* (a), the principle was applied to prevent the Housing Act, 1925, from overriding the special provisions of the London Open Spaces Act of 1893 with respect to Hackney Marshes. In *Wiltshire County Valuation Committee v. Marlborough and Ramsbury Rating Authority* (b), the Court of Appeal held that a special perpetual exemption granted by an enclosure Act of 1777 to a particular owner of land could not be abrogated by a subsequent statute unless it was addressed in plain language to land. There was no such abrogation in the Rating and Valuation Act, 1925.

The same canon of construction has also been applied in the case of the Rules of the Supreme Court (c) and of the county courts (d), which have been held not to repeal the provisions of special statutes in particular cases as to costs. Conversely, the provisions of the Public Authorities Protection Act, 1893, have been held not to override the provisions of the Rules of the Supreme Court as to depriving a party of costs for good cause (e).

The reason of this rule was thus stated by Wood, V.-C., in *London and Blackwall Ry. v. Limehouse D. B. W.* (f). "The Legislature," said he, "in passing a special Act, has entirely in its consideration

(z) (1906), 95 L. T. 183, 186, Buckley, J.

(a) [1936] 2 K. B. 29.

(b) (1948), 64 T. L. R. 179.

(c) *Hasker v. Wood* (1884), 54 L. J. Q. B. 419.

(d) *Reeve v. Gibson*, [1891] 1 Q. B. 652.

(e) *Bostock v. Ramsey U. D. C.*, [1900] 1 Q. B. 357; [1900] 2 Q. B. 616.

(f) (1856), 3 K. & J. 123, 128; approved in *Mayor, etc., of Ashton-under-Lyne v. Pugh*, [1898] 1 Q. B. 45, C. A.

some special power which is to be delegated to the body applying for the Act on public grounds. When a general Act is subsequently passed, it seems to be a necessary inference that the Legislature does not intend thereby to regulate all cases not specially brought before it, but looking to the general advantage of the community, without reference to particular cases, it gives large and general powers which in their generality might, except for this very wholesome rule of interpreting statutes, override the powers which, upon consideration of the particular case, the Legislature had before conferred by the special Act for the benefit of the public. The result of a contrary rule of construction would be that the Legislature, having authorised by a special Act the construction of some public work, would be supposed afterwards by a general Act to throw it into the power " of a few persons to prevent that public work from being carried out. Again, in *Thorpe v. Adams* (g). Bovill, C.J., commented on this rule as follows: " When," said he, " we look at the mode in which Acts of Parliament are passed, it cannot be presumed or conceived that the Legislature had had brought to its consideration all the special Acts and legislation which affect companies or individuals, and that is one reason for the adoption of the general principle I have adverted to." And Willes, J., added: " The good sense of the law as laid down by my Lord is quite obvious because if a Bill had been brought into Parliament to repeal the local Act, it would never have been allowed to pass into law without notice to the parties whose interests were affected by it, and opportunity being given to them to be heard in opposition to it, if necessary; whereas a general provision in a public Act is discussed with reference to general policy, and without any reference to private rights, with which there is no intention on the part of the Legislature to interfere." And again, in *Taylor v. Oldham & Co.* (h), Jessel, M.R., having stated the rule as given above as to the effect of general provisions in statutes upon special provisions, added: " If you once admit the doctrine that the general provisions are to overrule the special ones, anybody getting a clause inserted in a [private] Bill ought to be heard on every clause of that Act. It would be simply impossible to conduct private legislation at all if any such doctrine were admitted or prevailed." A good illustration of the working of this rule was given by Wood, V.-C., in *Fitzgerald v. Champneys* (i), with regard to the operation of the Fines and Recoveries Act, 1833, " by which, in the largest words, every tenant in tail is authorised to bar his entail even in those estates in which the reversion is in the Crown, which formerly could not be barred." " No one," said the Vice-Chancellor, " would think of arguing, or could argue successfully, that the Act would affect the entails made by special Act of Parliament, such as the Marlborough, the Wellington, or the Shrewsbury entails. And the reason is that the

(g) (1871), L. R. 6 C. P. 125, 136, 138.

(h) (1877), 4 Ch. D. 395, 410.

(i) (1861), 30 L. J. Ch. 777, 782.

Legislature, having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own Act where it makes no special mention of its intention to do so.”

Special enactment repealed by implication if utterly repugnant to subsequent general Act. But the rule must not be pressed too far, for, as Bramwell, L.J., said in *Pellas v. Neptune Marine Insurance Co.* (k), “a general statute may repeal a particular statute.” And if a special enactment, whether it be in a public or a private Act, and a subsequent general Act are absolutely repugnant and inconsistent with one another, the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act. Thus in *Bramston v. Colchester Corpn.* (l), it was held that the provisions of a local Act, under which certain arrangements had been made for maintaining borough prisoners in county gaols, were repealed by section 18 of the general Prisons Act, 1842, “for,” said Lord Campbell, C.J., “I think it was the intention of the Legislature to sweep away all local peculiarities, though sanctioned by special Acts, and to establish one uniform system except in so far as there are express exceptions”; and Wightman, J., added, “It was intended to make one general law superseding all local laws as to prisons and repealing all local Acts.” So, also, in *Great Central Gas Consumers Co. v. Clarke* (m), it appeared that by a local Act the gas company was limited to a charge of 4s. per 1,000 cu. ft., but by a subsequent public Act (23 & 24 Vict. c. 125), the company was compelled to supply gas of a much better quality and was allowed to charge a maximum price of 4s. 6d. per 1,000 cu. ft. It was contended, and the Court ultimately held, that the local Act was impliedly repealed by the subsequent public Act, and that consequently the limitation as to price contained in the local Act ceased to operate. “Although,” said the Court, “that section (in the private Act which limits the price) is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act.” So in *Daw v. Metropolitan Board of Works* (n), it was held that section 141 of the Metropolitan Management Act, 1855, which gave to the Metropolitan Board power to alter the names of streets, impliedly repealed 11 & 12 Vict. c. clxiii so far as it previously conferred the same power on the City Commissioners of Sewers. In *Duncan v. Scottish N. E. Ry.* (o), it was held that the exemption from liability to pay rates which was conferred on the defendant railway company by the special Acts under which it was made was taken away by a subsequent Poor Law Amendment Act, because as Lord Westbury

(k) (1880), 5 C. P. D. 34, 40.

(l) (1856), 6 E. & B. 246, 253, 254.

(m) (1863), 13 C. B. (N.S.) 838, 840, Pollock, C.B.

(n) (1862), 31 L. J. C. P. 223.

(o) (1870), L. R. 2 H. L. (Sc.) 20, 25.

said, "the rule given by this Poor Law Act (1845) is wholly inconsistent with the exemption alleged to be contained in the Acts of 1836" (the company's local Acts) (*p*). And in *Charnock v. Merchant* (*q*) it was held that section 1 of the Criminal Evidence Act, 1898, was intended to establish a single rule for all criminal Courts and cases, and to supersede the special rules as to evidence by the defendant in criminal cases created by previous statutes in the case of particular specified offences. And Channell, J., said: "It is of great importance to hold that the Criminal Evidence Act, 1898, has established one rule to be observed in all criminal Courts and cases. The sixth section amply establishes that."

(*p*) Cf. *Sion College Case*, [1900] 2 Q. B. 581; affirmed, [1901] 1 K. B. 617; *Corporation of London v. Netherlands Steamboat Co.*, [1906] A. C. 263, 272, distinguishing *Sion College Case*, per Lord James of Hereford.

(*q*) [1900] 1 Q. B. 474, 477.

CHAPTER VI

COMMENCEMENT AND DURATION OF EFFECT OF STATUTES

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Commencement.

1. *Date of commencement.* When no other date is fixed by an Act for its coming into operation it is in force from the date when it receives the royal assent (a). It is a common practice to specify in Acts of Parliament the day on which the Act is to come into operation. There is often an "appointed day" clause in an Act, as for instance in the Local Government Act, 1888, s. 109 "... the appointed day for the purpose of this Act shall ... be the first of April next ... or such other day earlier or later as the Local Government Board may appoint" (b). If a certain day is named, an Act "which," as the Court said in *Tomlinson v. Bullock* (c), "comes into operation on a given day,

(a) 33 Geo. 3, c. 13, p. 48 *ante*.

(b) As to the advantage of such a clause, see Carr, *Delegated Legislation*, pp. 10-12.

(c) (1878), 4 Q. B. D. 230, 232.

becomes law as soon as the day commences" (d). This rule is adopted in the Interpretation Act, 1889, s. 36 (2), which provides that Acts passed after 1889, and any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bylaws made under such Acts if expressed to come into operation on a particular day, are to be read as coming into operation immediately on the expiration of the previous day. But an Act will not have any operation until the day for its commencement, even though the sections of the Act may have been framed as if it would come into operation immediately it receives the royal assent (e), "because the last thing settled is when the Act shall come into operation; therefore all the sections are to be considered as speaking from the date so fixed, and are all governed by the last section" (f), i.e., the section which fixes the date. Different sections of an Act may come into operation at different dates, e.g., where a particular date is specified for the commencement of one part of the Act, and another date or no date or the passing of the Act is specified as the commencement of the rest (g). If one Act receives the royal assent a few days after another Act and the two Acts are repugnant, the one which received the royal assent last will have the effect of repealing the other. When two Acts come into force on the same day, it is not essential to hold them consistent, and the later in order of the two may be held to repeal the other so far as the two are repugnant (h). It has been held that a statutory order made by a Government Department which was not expressed to come into operation on a particular day did not come into operation until it was known to the persons concerned and the public generally (i). Section 36 (2) of the Interpretation Act, 1889, was not referred to, and it would seem not to be applicable as the Order was not expressed to come into operation on a particular day.

It is sometimes specially enacted that a statute is to come into

(d) In *Cole v. Porteous* (1891), 19 Ont. App. 111, this rule was applied so as to make a chattel mortgage executed at 12 noon subject to a statute which received the royal assent at 3 p.m. on the same day. Cf. *R. v. Sayward Trading, etc., Co., Ltd.* (1924), Exch. C. R. 15, 18.

(e) In the Real Property Limitation Act, 1874, the commencement of the Act was postponed till five years after its passing. Cf. the County Courts Act, 1903, which came into force on January 1, 1905, and the Railway Fires Act, 1905, which did not come into force till January 1, 1908, and the Agricultural Holdings Act, 1906, which was not to come into operation until January 1, 1909, but was before that date repealed as to England, and consolidated as the Agricultural Holdings Act, 1908. In the Local Government Acts of 1888 and 1894, and the London Government Act, 1899, the time for the commencement of the Act was left to be appointed by a department of the Government. The Law of Property Act passed April 9, 1925, came into force on January 1, 1926; the Limitation Act passed May 25, 1939, came into force on July 1, 1940; the Statutory Instruments Act, 1946, came into force on January 1, 1948.

(f) *Wood v. Riley* (1867), L. R. 3 C. P. 26, 27.

(g) *R. v. Weston*, [1910] 1 K. B. 17, decided on ss. 10, 19, of the Prevention of Crime Act, 1908. Cf. Welsh Sunday Closing Act, 1881, s. 3; Government of India Act, 1919.

(h) *Sheffield Corporation v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

(i) *Johnson v. Sargent & Sons*, [1918] 1 K. B. 101. See now Statutory Instruments Act, 1946, s. 3 and S.I. 1948, No. 1, Arts. 9, 10.

operation on some day prior to the day on which it receives the royal assent (*k*). Thus, in *Jamieson v. Att.-Gen.* (1), it was held that 11 Geo. 4 & 1 Will. 4, c. 49, s. 1, which enacted that certain duties should be levied from March 15, 1830, but did not receive the royal assent until July 16, 1830, operated from March 15.

Provisions for anticipating commencement. Where an Act passed after 1889 does not come into operation immediately upon its passing, and confers powers to do anything for the purpose of the Act, the power may be exercised, unless a contrary intention appears, before the commencement of the Act, so far as is necessary or expedient for the purpose of bringing the Act into effective operation at the date of its commencement. But no instrument made under the power comes into operation before the commencement of the Act unless a contrary intention appears in the Act (*m*). These provisions are intended to enable the judicial and administrative departments of State to frame and publish Orders in Council and the like and Rules of Court in the interval between the passing and commencement of any Act for the due application and enforcement of which they deem expedient.

Operation of Act upon person who could not know of its existence. As a British (*n*) Act of Parliament does not derive its effect from promulgation or publication (*o*), it binds the lieges in many cases before it has been physically possible to ascertain its terms. In accordance with the principle of law expressed by the legal maxim, *Ignorantia juris neminem excusat*, the moment an Act of Parliament actually comes into operation, strictly speaking every person who is amenable to the law of England is affected by it, even although it may be morally certain that he could not know that the statute in question had been passed. This was laid down by Lord Eldon in *R. v. Bailey* (*p*), where the prisoner was indicted under an Act of which it was clear that he could not have known the existence at the time he committed the offence with which he was charged; but Lord Eldon told the jury

(*k*) *R. v. Middlesex Justices* (1831), 2 B. & Ad. 818. It is stated in Dwaris, p. 544, and also in Maxwell, 9th ed., p. 410, on the authority of *Burn v. Carvalho* (1834), 1 A. & E. 883, that "where a particular day is named for its commencement, but the Royal assent is not given till a later day, the Act would come into operation only on the later day." This rule is not borne out by the case cited, which merely decides that as the language of 3 & 4 Will. 4, c. 42, s. 30, is "prospective only," it cannot apply to any proceeding which took place before the Act was passed. The Court said that the language of section 30 was very different from a question arising under section 21, the language of which was sufficiently comprehensive to include all actions brought by executors and administrators whether before or after the passing of the Act. In *Freeman v. Moyes* (1834), 1 A. & E. 338, a different decision was come to as to s. 31 of the same act, the language of that section not being in its terms prospective. Cf. *Re Athlumney*, [1898] 2 Q. B. 547.

(1) (1833), Alcock & Nap. 375.

(*m*) Interpretation Act, 1889, s. 37, *post*, Appendix B. Cf. *R. v. Minister of Town and Country Planning, Ex p. Montague Burton & Others*, [1951] 1 K. B. 1.

(*n*) The law of America and France on this subject is discussed in Dwaris, p. 545.

(*o*) See pp. 30-33, *ante*.

(*p*) (1800), Russ. & R. 1, 4.

that he was of opinion that he was, in strict law, guilty under the statute, although he could not have known that it had been passed, and that his ignorance of the fact could in no otherwise affect the case than that it might be the means of recommending him for a pardon. This ruling was subsequently upheld by all the Judges, and on their recommendation a pardon was granted to the prisoner, on the ground that he could not at the time he committed the offence have known of the existence of the Act of Parliament. It may, however, be observed that it was suggested by the Court in *Burns v. Nowell* (q) that "before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance, and though ignorance of the law may of itself be no excuse for any one who may act in contravention of it, such ignorance may nevertheless be taken into account, when it becomes necessary to consider the circumstances under which the act or proceeding was continued, and when and how it was discontinued with a view to determine whether a reasonable time had elapsed without its being discontinued." It is desirable that some interval should be given for people to have a physical possibility of learning the terms of a new law, but this is not always possible, nor could any uniform delay between passing and commencement be safely prescribed (r).

Modifying Acts. If an Act passed after 1850 repeals wholly or in part any former enactment and substitutes provisions in place of the repealed enactment, the latter remains in force until the substituted provisions come into operation (s).

Retrospective enactments.

2. *Meaning of "retrospective."* A statute is to be deemed to be retrospective (t), which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past (u). But a statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing" (x). In *Lauri v. Renad* (y), Lindley, L.J., said: "It is a fundamental rule of English

(q) (1880), 5 Q. B. D. 444, 454.

(r) As to the effect of Expiring Laws Continuance Acts, see p. 61 *ante*.

(s) Interpretation Act, 1889, ss. 11 (2), 41 (*post*, Appendix B), which repeal and re-enact s. 6 of Lord Brougham's Act (13 & 14 Vict. c. 21).

(t) The word is somewhat ambiguous. *Allen v. Gold Reefs of W. Africa*, [1900] 1 Ch. 656, 673, Lindley, L.J.

(u) Sedgwick, 160.

(x) *R. v. St. Mary Whitechapel (Inhabitants)* (1848), 12 Q. B. 120, 127; Lord Denman, C.J., where it was held that s. 2 of the Poor Removal Act, 1846, prevented the removal after its commencement of a pauper widow, proceedings for whose removal had been begun, but had not been completed before the Act passed. Cf. *R. v. Christchurch (Inhabitants)* (1848), 12 Q. B. 149, 156; *Master Ladies' Tailors' Organisation v. Minister of Labour*, [1950] 2 A. E. R. 525.

(y) [1892] 3 Ch. 402, 421. See also *Re Snowden Colliery Co., Ltd., South-Eastern Coalfields Extension Co. v. The Co.* (1925), 94 L. J. Ch. 305 (C. A.).

law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. And the same rule involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.” “There are many cases upon the general doctrine whether an Act of Parliament may be read retrospectively or not, and there are many cases upon the meaning of particular statutes. But the general law was concisely stated by Lord Hatherley in his judgment in *Pardo v. Bingham* (z), where he said: ‘The question is . . . secondly, whether on general principles the statute ought in this particular section to be held to operate retrospectively, the general rule of law undoubtedly being, that except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to receive a retrospective construction. . . . In fact, we must look at the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was the Legislature contemplated’” (a). In *Mohammad Abdussamad v. Kurban Husain* (b), Lord Lindley said: “It is not, however, in accordance with sound principles of interpreting statutes to give them a retrospective effect.” In this case the Judicial Committee declined to construe sections 8 and 10 of the Indian Act No. 1 of 1869, relating to the Oudh Talookdars, so as to deprive the successors to the estates of a person who had died before these sections came into force of the rights which they had acquired on his death. Revenue Acts are often made to take effect as from a day before their passing. But extremely plain language would be needed to render penal an act done before the passing of a statute (c).

There are at least four reported instances of retrospective penalties inflicted during the last war. In *Director of Public Prosecutions v. Lamb* (d), regulation 5 (1) of the Defence (Finance) Regulations, 1939 provided a penalty against the sale of foreign currency. A later regulation increasing the penalties came into force on June 11, 1940. The prisoners were charged with offences committed between September 3, 1939, and May 11, 1940. The Divisional Court held that the language of the amending Order was clear in imposing increased penalties on persons thereafter convicted. This case was applied in *Buckman v. Button* (e) in a case of failure to register a business in controlled goods.

(z) (1870), L. R. 4 Ch. App. 735, 739, 740.

(a) *Re Chapman*, [1896] 1 Ch. 323, 327, *per* Kekewich, J.

(b) (1903), L. R. 31 Ind. App. 30, 37.

(c) In *O'Donohue v. Britz* (1904), 1 Australia C. L. R. 391, an unsuccessful attempt was made to prosecute, under the Commonwealth Customs Act, 1901 (which came into force on October 4, 1901), a person who, on October 16, 1901, made a declaration in New South Wales as to certain medicines not then taxable under the New South Wales Customs Tariff, but made taxable by the Commonwealth Customs Tariff Act, 1902 (No. 14), as from October 8, 1901. As to the Excise Tariff Act, 1902, No. 11, see *Colonial Sugar Refining Co. v. Irving*, [1906] A. C. 360.

(d) [1941] 2 K. B. 89.

(e) [1943] K. B. 405.

In *Mischeff v. Springett* (f), the appellant bought 864 cases of sardines on April 9, 1941; on April 11 he sold 300. Invoices were sent on May 20, and on May 21 goods were appropriated to the contract. On May 19, the maximum price order came into force prohibiting sales above that price. The appellant's price under his contract was higher. It was held that there was no sale till May 21 and the appellant was rightly convicted under the order. This is perhaps not technically a retrospective penalty. In *R. v. Oliver* (g), increased penalties for supplying sugar without a licence operated before the trial. These were held to be retroactive and applicable at the date of conviction although the regulation increasing the penalties was not in force when the offence was committed.

Difference between "retrospective" and "ex post facto" statutes. A retrospective statute is different from an *ex post facto* statute (h). "Every *ex post facto* law, . . ." said Chase, J., in *Calder v. Bull* (i), "must necessarily be retrospective, but every retrospective law is not an *ex post facto* law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement: as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition (k), that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction. . . . There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime" (l).

Retrospectivity not presumed. The Acts of Parliament (Commencement) Act, 1793 (m), in no way prevents Parliament from making an Act retrospective if the intention to do so is apparent. "It is obviously competent for the Legislature, in its wisdom, to make the provisions of an Act of Parliament retrospective" (n). "No one denies," said

(f) [1942] 2 K. B. 331.

(g) [1944] K. B. 68.

(h) Blackstone (Comm. vol. i, p. 46) describes *ex post facto* laws as those by which "after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." Acts of indemnity are, however, also *ex post facto* laws so far as they take away civil rights of action, and are statutory pardons as to criminal liability, and as to indemnity for acts done in exercise of martial law: *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; and Journ. Soc. Comp. Legislation (N.S.), 1900, p. 60.

(i) (1798), 3 Dallas (U. S.) 386, 391.

(k) The prohibition referred to is contained in the Constitution of the United States of America, Article I, s. 9 prohibiting the passing of *ex post facto* laws.

(l) Cited and approved in *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1 at p. 26, Willes, J.

(m) See p. 49 ante.

(n) *Smith v. Callander*, [1901] A. C. 297, 305, Lord Ashbourne.

Dr. Lushington in *The Ironsides* (o), "the competency of the Legislature to pass retrospective statutes if they think fit (p), and many times they have done so." Philosophical writers (q) have, it is true, denied that any Legislature ought to have such a power, and it is indisputable that to exercise it under ordinary circumstances must work great injustice. But "before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct interpretation" (r). And perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right (s) or obligation otherwise than as regards matter of procedure (t), unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only (u).

In *Gardner v. Lucas* (x), Lord O'Hagan said: "Unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective, and not retrospective." In *Reid v. Reid* (y), Bowen, L.J., said: "The particular rule of construction which has been referred

(o) (1862), 31 L. J. P. M. & A. 129, 131.

(p) The French code contains a positive provision that laws are not to have any retrospective operation. "*La loi ne dispose que pour l'avenir, elle n'a point d'effet rétroactif*": Code Civil, Art. 2.

(q) See Sedgwick, p. 160.

(r) *Smith v. Callander*, *supra* at p. 305.

(s) See *Schmidt v. Ritz* (1901), 31 Canada 602, 605, 606, where Strong, C.J., said: "That the Legislature had demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrant a retroactive operation carried beyond the meaning of the terms used strictly construed. . . . It is said that to restrict the latter part of the amending clause . . . is to attribute to it a very insignificant modicum of relief; the answer must be that it is the very intent of this rule of interpretation, designed to prevent injustice resulting from interference with rights of property except in cases where the unmistakable language of the Legislature demands an *ex post facto* construction." Cf. *Reid v. Reid* (1886), 31 Ch. D. 402.

(t) Page 370, *post*.

(u) Some of the many authorities for this proposition are: *Main v. Stark* (1890), 15 App. Cas. 384, 387, Lord Selborne; *Gillmore v. Shooter* (1678), 2 Mod. 310, on the Statute of Frauds; *Moon v. Durden* (1848), 2 Ex. 22, on the Gaming Acts; *Hickson v. Darlow* (1883), 23 Ch. D. 690, on the Bills of Sale Acts; *Waugh v. Middleton* (1853), 8 Ex. 352, an extreme case, but not disapproved in *Larpent v. Bibby* (1855), 5 H. L. C. 481; *Williams v. Harding* (1866), L. R. 1 H. L. 9; *Hough v. Windus* (1884), 12 Q. B. D. 224; *Ellis v. M'Cormick* (1869), L. R. 4 Q. B. 271, on the Bankruptcy Acts; *Re Joseph Suche & Co., Ltd.* (1875), 1 Ch. D. 48, on s. 10 of the Judicature Act, 1875; *Re Athlumney*, [1898] 2 Q. B. 547, 551; *Ward v. British Oak Insurance Co.*, [1932] 1 K. B. 392, 397, 398; *West v. Gwynne*, [1911] 2 Ch. 1, 12; *Re Snowden Colliery Co.* (1925), 94 L. J. Ch. 305; *Beadling v. Goll* (1922), 39 T. L. R. 128; *Henshall v. Porter*, [1923] 2 K. B. 193; *Croxford v. Universal Insurance Co.*, [1936] 2 K. B. 253; *Barber v. Pigden*, [1937] 1 K. B. 664, 678 (Law Reform (Married Women and Tortfeasors) Act, 1935, held to have a retrospective effect as abolishing "legal fictions"); *Re Welsh Anthracite Collieries, Industrial and General Trusts v. Welsh Anthracite Collieries*, [1950] Ch. 18 (Companies Act, 1948, s. 372, as to annual returns by a receiver not retrospective).

(x) (1878), 3 App. Cas. 582, 601.

(y) (1886), 31 Ch. D. 402, 408.

to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim, *Omnis nova constitutio futuris formam imponere debet non præteritis* (z)—that is, that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought, nevertheless, to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition, that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant" (a).

In *Young v. Adams* (b), the Judicial Committee had to consider whether a New South Wales Civil Service Act was retrospective in its operation. Lord Watson said: "It does not seem to be very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already been valid in a very limited class of persons, consisting, so far as appears, of one individual, viz., the respondent. In such cases their lordships are of opinion that the rule laid down by Erle, C.J., in *Midland Ry. v. Pye* (c), ought to apply. They think that in the present case the learned Chief Justice (of N. S. Wales) was right in saying that a retrospective operation ought not to be given to the statute unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks our sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done into a legal act, and to deprive the person injured of the remedy which the law then gave him." The Court of Appeal has recently held that the effect of sections 9 and 10 of the Landlord and Tenant (Rent Control) Act, 1949, was to make the tenant retrospectively a protected tenant, although at the date of the summons for possession he was not entitled to remain in possession of the premises. Somervell, L.J., was of opinion that the rule that if an alteration in the law occurs pending action, the rights of the parties are to be decided by the law and equity

(z) 2 Inst. 292, adopted in *Urquhart v. Urquhart* (1853), 1 Macq. H. L. (Sc.) 658, 662, Lord Cranworth. See *Gillmore v. Shooter* (1678), 2 Mod. 310; *Ashburnham v. Bradshaw* (1740), 2 Atk. 36; *Macmillan v. Dent*, [1907] 1 Ch. 107, 124, Fletcher Moulton, L.J., on the Copyright Acts.

(a) Cf. *R. v. Ipswich Union* (1877), 2 Q. B. D. 269, 270, where Cockburn, C.J., stated that statutes changing the law are presumably intended to apply to a state of facts coming into existence after the commencement of the statute. See also *Association Pharmaceutique de Quebec v. Livernois* (1900), 31 Canada 43, 60, Sedgewick, J.; *Schmidt v. Ritz* (1901), 31 Canada 602, 605, 606, Strong, C.J.

(b) [1898] A. C. 469, 476.

(c) 10 C. B. (N.S.) 179, 191.

existing when the action was begun, does not apply to this legislation (the Rent Restriction Acts) (d).

Presumption against retrospectivity rebutted. It being, then, the general rule of law that statutes are not to operate retrospectively, we have now to consider under what circumstances this general rule has been departed from, and to examine the grounds, so far as they can be ascertained, for such departure.

(a) *By express enactment.* Sometimes it is expressly enacted that an enactment shall be retrospective; thus, by 23 & 24 Vict. c. 38, s. 12, it is enacted that "clause 32 of 22 & 23 Vict. c. 35, shall operate retrospectively." The Town and Country Planning (Amendment) Act, 1951 (14 & 15 Geo. 6, c. 19), s. 1 (3) provided that the principal Act [the Town and Country Planning Act, 1947] shall have effect and shall be deemed for all purposes to have had effect, as if it had originally been enacted as amended by the preceding sub-section. And in *West v. Gwynne* (e), the Court of Appeal held that by reason of section 14 (9) of the Conveyancing Act, 1881 (a retrospective section), section 3 of the Conveyancing and Law of Property Act, 1892, ought to be applied to a lease of the year 1874.

(b) *By necessary implication from the language employed.* If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation (f). "Baron Parke," said Lord Hatherley in *Pardo v. Bingham* (g), "did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated." But a statute is not to be read retrospectively except of necessity. In *Re Ashcroft* (h), Lord Esher, M.R., said: "I think therefore that so far as s. 47 of the Bankruptcy Act, 1883, is a repetition of s. 91 of the Bankruptcy Act, 1869, the Legislature obviously intended to replace the old enactment at once by the new one and that to that extent s. 47 must apply to transactions which took place before the commencement of the new Act." He held however that there was no reason to extend the new part of s. 47 to antecedent transactions. In *Main v. Stark* (i), Lord

(d) *Hutchinson v. Jauncey*, [1950] 1 K. B. 574, 578, applied in *Jones v. Rosenberg*, [1950] 2 K. B. 52. Cf. *Remon v. City of London Real Property Co.* [1921] 1 K. B. 49.

(e) [1911] 2 Ch. 1.

(f) Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, was held retrospective largely on the expression in it "shall have been" etc. *Lane v. Lane*, [1896] P. 133.

(g) (1869), L. R. 4 Ch. App. 735, 740.

(h) (1887), 19 Q. B. D. 186, 195.

(i) (1890), 15 App. Cas. 384 at p. 388.

Selborne said: " Their lordships, of course, do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language, which might give to words *prima facie* prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it." And, " Words not requiring a retrospective operation, so as to affect an existing statute prejudicially, ought not to be so construed."

Effect of a postponing clause. A postponement clause in an Act has been sometimes said to be an indication against the presumption that a retrospective intent is not to be inferred. In *Re Athlumney* (k), Wright, J., said: " One exception to the general rule has sometimes been suggested, viz., that where, as here (l), the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operations is intended. But this exception seems never to have been suggested except in relation to enactments such as Statutes of Limitation, and even in relation to these it is questioned in *Moon v. Durden*" (m). This suggested exception was the main ground for the decision in *Towler v. Chatterton* (n). In that case, to an action of *indebitatus assumpsit* there was a plea of the Statute of Limitations. The plaintiff proved a verbal promise to pay made by the defendant in February, 1828; the action was commenced in January, 1829, and the question was whether the verbal promise made in February, 1828, was sufficient to take the case out of Lord Tenterden's Act, passed in May, 1828, which enacted, in section 1, that no promise by words only, and not in writing, should be sufficient to take a case out of the operation of the Statute of Limitations. By section 10 it was enacted that the Act should not come into operation until January 1, 1829. It was held that the verbal promise in February, 1828, was of no avail, for that the statute after it had once come into operation, applied to past as well as to future transactions. There are also two *nisi prius* decisions on the same point, which are cited in *Towler v. Chatterton*, and which even go further, for in them it was held that the statute applied to actions commenced before January 1, 1829, if the actual trial did not take place until after that date. These three decisions were commented upon somewhat adversely by Rolfe, B., in an elaborate judgment in *Moon v. Durden* (o). Notwithstanding these criticisms, *Towler v. Chatterton* was followed in *R. v. Leeds and Bradford Ry.* (p). In that case, damage having been done by the railway company to the land of one Edmondson in constructing their line in the years 1846 and 1847, he, Edmondson, had obtained an award from certain justices under sections 22, 24 of the Lands Clauses Consolidation Act, 1845, of a sum of money to be

(k) [1898] 2 Q. B. 547, 552.

(l) *I.e.*, s. 23 of the Bankruptcy Act, 1890.

(m) (1848), 2 Exch., 22.

(n) (1829), 6 Bing. 258.

(o) *Supra* at p. 33.

(p) (1852), 21 L. J. M. C. 193, 195.

paid by the company as compensation. This award was not obtained, however, until three years after, *i.e.*, in 1850. In the year 1848 the Summary Jurisdiction Act, 1848, was passed (and came into operation six weeks after its passing), by which it was enacted in section 11 that such awards as these must be applied for and obtained within six months from the time when the damage was done. The question therefore arose whether this Act had a retrospective operation and was to apply to cases of damage done before its passing. The Court decided that it was retrospective, and Lord Campbell, C.J., in giving judgment, said: "If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation, but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. . . . A certain time was allowed before the Act was to come into operation, and that removes all difficulty. The case of *Towler v. Chatterton* is strongly in point" (q). Again, in *Wright v. Hale* (r), Pollock, C.B., was to a certain extent influenced by the fact that the Act there in question was not to come into operation immediately upon its passing. For he says: "I think that where an Act of Parliament alters the proceedings which are to obtain in the administration of justice, and does not specially say that it shall not apply to any action already brought, but merely causing the operation to pause for a certain time, and giving an opportunity for parties to retire from suits, it applies to actions already brought."

The result of these decisions seems to be that the suggested exception is rarely if ever applicable, and cannot be accepted as an undoubted rule of construction. Moreover, as pointed out by Wright, J., in *Re Athlumney* (s), the use of the past tense (*e.g.*, "shall have been"), which might suggest an inference as to retrospectivity in former statutes, is common in modern drafting in cases where retrospectivity is clearly not contemplated.

Explanatory and declaratory Acts retrospective. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or, as Parke, J. (t), said in *R. v. Dursley* (u), "to 'explain' a former statute," the subsequent statute has relation back to the time when the prior Act was passed. Thus, in *Att.-Gen. v. Pougett* (x), it appeared that by 53 Geo. 3, c. 33, a duty was imposed upon hides of

(q) *R. v. Leeds and Bradford Ry.* was dissented from in *R. v. Edwards* (1884). 13 Q. B. D. 586, on grounds not affecting the rule laid down by Lord Campbell.

(r) (1860), 30 L. J. Ex. 40, 42.

(s) [1898] 2 Q. B. 547, 553.

(t) Afterwards Baron Parke.

(u) (1832), 3 B. & Ad. 465, 469.

(x) (1816), 2 Price 381, 392.

9s. 4d., but the Act omitted to state that it was to be 9s. 4d. per cwt., and to remedy this omission 53 Geo. 3, c. 105, was passed. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s. 4d. per cwt., but Thomson, C.B., in giving judgment for the Attorney-General, said: "The duty in this instance was in fact imposed by the first Act, but the gross mistake of the omission of the weight for which the sum expressed was to have been payable occasioned the amendment made by the subsequent Act, but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act."

Where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable. In *Att.-Gen. v. Theobald* (y), section 11 of the Customs and Inland Revenue Act, 1889, as to the liability of voluntary settlements to stamp duty, was held retrospective, although the litigation in which its terms were involved had commenced before it was passed. Acts of this kind, like judgments, decide similar cases pending when the judgments are given, but do not reopen decided cases (z). In *Young v. Adams* (a), Lord Watson held that *Att.-Gen. v. Theobald* and *R. v. Dursley* dealt with enactments having no analogy with the statute then before the Committee (b).

So a person charged under the Vagrancy Act, 1898, may by section 7 (5) of the Criminal Law Amendment Act, 1912, be proceeded against by indictment. In case of a second or subsequent conviction on indictment he could be sentenced to whipping in addition to a maximum of two years' imprisonment. To justify a sentence of whipping, the Court of Criminal Appeal held that it was not necessary that the previous convictions should have been by indictment and not by summary procedure or that they should have taken place since the Act of 1912 was passed (c).

Statutes passed to protect the public sometimes held retrospective. If a statute is passed for the purpose of protecting the public against some evil or abuse, it may be allowed to operate retrospectively, although by such operation it will deprive some person or persons of a vested right. Thus, in *R. v. Vine* (d), it was held that 33 & 34 Vict. c. 29, s. 14 (e), which enacted that "every person convicted of felony

(y) (1890), 24 Q. B. D. 557.

(z) See *Att.-Gen. v. Marquis of Hertford* (1849), 3 Ex. 670; *Steele v. M'Kinlay* (1880), 5 App. Cas. 755; *Eyre v. Wynn-Mackenzie*, [1896] 1 Ch. 135; *Day v. Kelland*, [1900] 2 Ch. 745; *Lord Suffield v. Inland Revenue Commissioners*, [1908] 1 K. B. 865, 892, where Bray, J., held s. 7 of the Revenue Act, 1903, not to be declaratory nor retrospective.

(a) [1898] A. C. 469, 476.

(b) See p. 361 *ante*.

(c) *R. v. Austin*, [1913] 1 K. B. 551. Sentences of whipping were abolished by the Criminal Justice Act, 1948, s. 2.

(d) (1875), L. R. 10 Q. B. 195. Cf. *Re Pulborough School Board Election*, [1894] 1 Q. B. 725, 734, Lord Esher, M.R. For recent examples of retrospective penalties see p. 358 *ante*.

(e) Now replaced by Licensing (Consolidation) Act, 1910, s. 35.

shall be for ever disqualified from selling spirits by retail," applied to a person who, after having been so convicted, had obtained a licence to sell spirits, and was actually holding it at the time when the Act came into force. The intention of the Act was construed to be to protect the public from having inns kept by persons of bad character, although this might have a retrospective effect. It must, however, be observed that Lush, J., dissented from the judgment of the majority of the Court. "This is therefore," said he, "a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used. Now, I cannot collect any indication of an intention to make the enactment retrospective. . . . This is, therefore, the very case in which the above canon of construction applies" (f).

Statutes virtually retrospective. Sometimes a statute, although not intended to be retrospective, will in fact have a retrospective operation. For instance, if two persons enter into a contract, and afterwards a statute is passed, which, as Cockburn, C.J., said in *Duke of Devonshire v. Barrow, etc., Co.* (g), "engrafts an enactment upon existing contracts" and thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such a statute has, in effect a retrospective operation. Similarly, if a statute is passed which renders the performance of a contract impossible, the rule of law is that the contract is frustrated by supervening impossibility (h), consequently in this case also the statute operates retrospectively. Thus, in *Brewster v. Kitchell* (i), it was held that where "the question is whether a covenant be repealed by Act of Parliament, this is the difference, viz., where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which was then unlawful, and an Act comes and makes it lawful, such an Act of Parliament does not repeal the covenant" (k). So, in *Baily v. De Crespigny* (l), the defendant let a piece of ground to the plaintiff, and covenanted that neither he nor his assigns would build on the land immediately adjoining it. After the making of this covenant, a railway company took by compulsory purchase under the powers of their special Act this adjoining piece of land and built a station upon it, whereupon the plaintiff sued the defendant; but it was held, on the authority of the

(f) *R. v. Vine*, *supra*, at p. 201.

(g) (1877), 2 Q. B. D. 286, 289.

(h) Cf. Chitty Contracts, 20th ed. pp. 214 *et seq.*

(i) (1698), 1 Lord Raymond, 317, 321, *per* Lord Holt.

(k) Followed in *Doe v. Rugeley* (1844), 6 Q. B. 107, and in *Newington L. B. v. Cottingham L. B.* (1879), 12 Ch. D. 725.

(l) (1869), L. R. 4 Q. B. 180.

above-mentioned case of *Brewster v. Kitchell*, that the defendant was not liable on the covenant, which the Legislature itself had prevented him from fulfilling. The principle of this case has been applied in later cases to contracts the performance of which in manner contemplated by the parties has been rendered impossible by reason of some change in the law (*m*).

Special cases. (a) *Rates.* With regard to the effect of statutes authorising the levy of rates, it was pointed out by Cockburn, C.J., in *Bradford Union v. Wilts* (*n*), that the principle "was adopted long ago, and has been long acted upon," that if the language of the statute is *prima facie* prospective "the rate must be prospective, and not retrospective, so that the expenses shall fall on the ratepayers who are ratepayers at the moment of the expenses being incurred." "Consequently," he added, "whenever the Legislature thinks it expedient to authorise the making of retrospective rates, it fixes the period as to which the rate may be retrospectively made."

(b) *Taxes.* In *Lord Suffield v. Inland Revenue Commissioners* (*o*), Bray, J., held that section 7 of the Revenue Act, 1903, could not be construed retrospectively so as to reduce the stamp duty on a deed executed before its commencement from the duty leviable under section 15 of the Stamp Act, 1891.

(c) *Bankruptcy.* In *Ex p. Board of Trade, re Norman* (*p*), an unsuccessful attempt was made to show that the Bankruptcy Act, 1890, was retrospective by reference to rules and forms made under the Deeds of Arrangement Rules, 1890.

(d) *Licensing.* The Sunday Closing (Wales) Act, 1881 (*q*), received the royal assent on August 27, 1881. Section 3 provided that it should come into operation on the day next appointed for the annual licensing meeting in each place in Wales. An Act of 1828, 9 Geo. 4, c. 61, ss. 1, 2 (*q*), required the licensing meeting to be held between August 20 and September 14 in each year, and the day must be appointed at least twenty-one days before the meeting is held. In *Richards v. McBride* (*r*), it was held—(1) that although the preamble suggested the desirability of a change in the law, this did not give any clue as to fixing the commencement of the Act; (2) that the Act came into force at the licensing meetings of 1882, and not at those of 1881, inasmuch as it was impossible to appoint the meetings for 1881 in the interval between the passing of the Act and the last day for which they could by law be held; (3) that the Court could not construe the Act on the assumption that it was drawn in the expectation that it would pass

(*m*) See *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A. C. 119. *Bank Line v. Capel*, [1919] A. C. 435; *Marshall v. Glanvill*, [1917] 2 K. B. 87.

(*n*) (1868), L. R. 3 Q. B. 604, 616.

(*o*) [1908] 1 K. B. 865, 892.

(*p*) [1893] 2 Q. B. 369. Cf. *Re Pulborough School Board Election*, [1894] 1 Q. B. 725.

(*q*) The Acts of 1828 and 1881 are now incorporated in the Licensing (Consolidation) Act, 1910.

(*r*) (1882), 8 Q. B. D. 119.

much sooner than it did, or receive evidence to support that suggestion.

Presumption against taking away vested rights. It is a well "recognised rule that statutes should be interpreted, if possible, so as to respect vested rights" (s), and such a construction should never be adopted if the words are open to another construction (t). This rule is especially important with respect to statutes for acquiring lands for public purposes (u). For it is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights (v). But it must be a "vested right" in the strict sense in order to raise the presumption, for "there is no presumption that an Act of Parliament is not intended to interfere with existing rights. Most Acts of Parliament in fact do interfere with existing rights" (x).

In 1888 a restriction was for the first time imposed (y) on persons desiring to practise as patent agents, with a saving for rights acquired (z) before the Patents Act, 1888, came into force. By rules under that Act made in 1890, and having legislative force, the business of a patent agent was put under regulations. In *Starey v. Graham* (a), it was held by Channell, J., that "right acquired" did not include a right on the part of persons practising as patent agents before the Act of 1888 to practise and describe themselves as such after the Act. He defined a "right acquired" as "some specific right which in one way or another has been acquired by an individual and which some persons have got and others have not". It is not a "right" in the popular sense. The learned Judge added "Before the passing of the Act, everybody had the right to call himself a patent agent, that is to say, the law did not forbid him to do so. A right enjoyed in that way is not within the meaning of this saving clause (z) a 'right required' otherwise it is obvious that such a clause would nullify the operation of any Act in which the clause was inserted."

(s) *Hough v. Windus* (1884), 12 Q. B. D. 224, at p. 237, Bowen, L.J. *Ward v. British Oak Insurance Co.*, [1932] 1 K. B. 392, 397, 398. *Re A Debtor*, [1936] Ch. 237, 243, Lord Wright, *National Real Estate & Financial Co. v. Hassan*, [1939] 2 K. B. 61.

(t) See *Cowan v. Lockyer* (1904), 1 Australia C. L. R. 460, 466. *Hedderwick v. Federal Commissioner of Land Tax* (1913), 16 Australia C. L. R. 27, 37.

(u) See *Cholmondely v. Clinton* (1821), 4 Bligh (H. L.) 1; *Clissold v. Perry* (1904), 1 Australia C. L. R. 363, 373, *affd.*, [1907] A. C. 73.

(v) *Macdonald (Lord) v. Finlayson* (1885), 12 Rettie (Sc.) 231. *Marshall v. Blackpool Corporation*, [1933] 1 K. B. 688; [1933] 2 K. B. 339; [1935] A. C. 17, (the common law right of a landowner of immediate access to the highway not abrogated by doubtful words in a local Act).

(x) Buckley, L.J., in *West v. Gwynne*, [1911] 2 Ch. 1 at p. 12.

(y) By s. 1 of the Patents, etc., Act, 1888, now repealed and re-enacted as s. 84 of the Patents, etc., Act, 1907, and the Register of Patent Agents Rules, 1890.

(z) Section 27 of the Patents Act, 1888. "Nothing in this Act shall affect the validity of any act done, right acquired or liability incurred before the commencement of the Act."

(a) [1899] 1 Q. B. 406, 411.

In *Reynolds v. Att.-Gen. for Nova Scotia* (b), it was held that this rule did not extend to protect from the effect of a repeal a privilege which did not amount to an accrued right.

And in the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed (c), and so far as regards repealing Acts this rule is clearly recognised by section 38 (2) of the Interpretation Act, 1889 (d). Where, however, the necessary intendment of an Act is to affect pending causes of action, the Court will give effect to the intention of the Legislature even though there is no express reference to pending actions (e).

So careful are the Courts in endeavouring to protect vested rights that we find that in several cases Judges have refused to allow statutes to have a retrospective operation, although their language seemed to imply that such was the intention of the Legislature, because, if the statutes had been so construed, vested rights would have been defeated. In *Gardner v. Lucas* (f), Lord Blackburn stated this rule of law in the following way with regard to the effect of a statute upon a transaction past and closed. "Where," said he, "the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case." In *Eyre v. Wynn-Mackenzie* (g), the Court of Appeal held that the Mortgagees' Legal Costs Act, 1895, did not affect judgments already given when it was passed, though section 3 was retrospective (h). In *Moon v. Durden* (i), an action to recover a sum of money alleged to have been won upon a wager was commenced in June 1845. In August 1845, the Gaming Act, 1845, was passed, which enacted, in section 18, that "no suit shall be brought or maintained for recovering" any such sum of money, and the question was whether that enactment was retrospective so as

(b) [1896] A. C. 240, 244. In a New Zealand case on a proceeding under the Imperial Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), it was held that a statute of Victoria (No. 1737), passed in 1901, operated to render penal disobedience to orders made under an earlier statute (the Marriage Act, 1890) of Victoria: *Re Coutts* (1902), 22 N. Z. L. R. 203. But cf. *R. v. Griffiths*, [1891] 2 Q. B. 145. (Bankruptcy Act, 1890, s. 26 not retrospective as to offences under Bankruptcy Act, 1869, s. 11 (13), (14), (15).)

(c) *Leeds and County Bank v. Walker* (1883), 11 Q. B. D. 84, at p. 91; *Colonial Sugar Refining Co. v. Irving*, [1905] A. C. 369, and see Wilberforce 157.

(d) See p. 324 *ante*, and Appendix B. *post*.

(e) *Hutchinson v. Jauncey*, [1950] 1 K. B. 574, at p. 579, *per* Evershed, M.R., followed in *Jonas v. Rosenberg*, [1950] 2 K. B. 52.

(f) (1878), 3 App. Cas. 582, 603.

(g) [1896] 1 Ch. 135.

(h) Cf. *Couch v. Jefferies* (1769), 4 Burr. 2460.

(i) (1848), 2 Ex. 22, 42.

to defeat an action already commenced. It was held that it was not retrospective, and Parke, B., in his judgment, said: "It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation" (k). So, too, section 4 of the Trade Disputes Act, 1906, which enacts that "an action for tort against a trade union shall not be entertained by any Court," has been held not to prevent the Courts from hearing and giving judgment in actions of that kind begun before the passing of the Act (l). The Gaming Act, 1922, repealed section 2 of the Gaming Act, 1835 (which made money paid to the holder of securities given for consideration arising out of certain gaming transactions recoverable from the person to whom the securities were originally given) and enacted that "no action for the recovery of money under the said section shall be entertained by any Court." The Court of Appeal in *Beadling v. Goll* (m), held that the section was not retroactive, and that the Act did not operate to put an end to pending actions. And in *Henshall v. Porter* (n), McCardie, J., held that in accordance with well-established rules of construction, as well as by virtue of section 38 (2) of the Interpretation Act, 1889, the Gaming Act of 1922 does not prevent the bringing of an action under the repealed section 2 of the Act of 1835 after the date when the repealing Act came into force in respect of a cause of action which had arisen before that date.

In *Bank of Athens v. Royal Exchange Assurance* (o) it was held that the Law Reform (Miscellaneous Provisions) Act, 1934, which allows interest on a debt or damages to be awarded for the period (or any part of it) between the accrual of the cause of action and the date of judgment, was not to be restricted to proceedings begun after the Act came into force, the words of the subsection (s. 3. sub-s. 1) being unrestricted and giving a discretion to award such interest in any proceeding begun either before or after the operation of the Act.

Pending actions affected by new procedure or provision as to costs. But there is no vested right in procedure or costs. Enactments dealing with these subjects apply to pending actions, unless a contrary intention is expressed or clearly implied. "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely

(k) See also *Knight v. Lee*, [1893] 1 Q. B. 41, where it was held that the Gaming Act, 1892, was not retrospective.

(l) *Smithies v. National Union of Operative Plasterers*, [1909] 1 K. B. 310. Cf. *Wright v. Hale* (1860), 30 L. J. Ex. 40, 42.

(m) (1922), 39 T. L. R. 128. See also *Bowling v. Camp* (1922), 39 T. L. R. 31.

(n) [1923] 2 K. B. 193.

(o) [1938] 1 K. B. 771.

affect procedure, and do not extend to rights of action" (p). For "it is perfectly settled that if the Legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be" (q). "A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits commenced before its passing" (r). In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, "it will be held to apply *prima facie* to all actions, pending as well as future" (s).

Right of appeal not affected as being a matter of existing right. In *Colonial Sugar Refining Co. v. Irving* (t), an application was made to the Judicial Committee to dismiss an appeal from the judgment of the Supreme Court of Queensland, on the ground that the power of the Court below to give leave to appeal had been abrogated by section 39 of the Australian Commonwealth Judiciary Act, 1903. The action in which the appeal was brought was commenced on October 25, 1902. The Judiciary Act came into force on August 25, 1903, and the leave to appeal was given on September 4, 1903. The Judicial Committee dismissed the application, Lord Macnaghten saying: "As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the [Judiciary] Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day the appellants [the Sugar Co.] would be entitled to succeed. The Judiciary Act is not retrospective

(p) *Re Joseph Suche & Co., Ltd.* (1875), 1 Ch. D. 48, 50, Jessel, M.R. This rule was for the first time distinctly enunciated by the Court of Exchequer in *Wright v. Hale* (1860), 30 L. J. Ex. 40, 42. "I have always understood," said Pollock, C.B., "that there is a considerable difference between laws which affect vested rights and those laws which merely affect the proceedings of Courts; as, for instance, declaring what shall be deemed good service, what shall be the criterion to the right to costs, how much costs shall be paid, the manner in which witnesses shall be paid, or what witnesses the party shall be entitled to, and so on. . . . I do not think a matter of that sort can be called a right in any sense in which Lord Coke in his Institutes has spoken of rights." See also *Pickup v. Wharton* (1832), 2 Cr. & M. 401; *Cox v. Thomason* (1834), 2 Cr. & J. 498; *Pinhorn v. Sonster* (1861), 21 L. J. Ex. 336, and *Re Athlumney*, [1898] 2 Q. B. 547, 552.

(q) *Gardner v. Lucas* (1878), 3 App. Cas. 582, 603, Lord Blackburn. *R. v. Southampton Income Tax Commissioners*, [1916] 2 K. B. 249; *affd.*, [1917] 1 K. B. 259.

(r) *Watton v. Watton* (1866), L. R. 1 P. & D. 227, 229, Sir James Wilde: adopted in *Att.-Gen. v. Theobald* (1890), 24 Q. B. D. 557.

(s) *Kimbray v. Draper* (1868), L. R. 3 Q. B. 160, 163, Blackburn, J., and see to the same effect *Welby v. Parker*, [1916] 2 Ch. 1 (suspension of a particular form of remedy).

(t) [1905] A. C. 369, 372.

by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

In accordance with this rule, the Bankruptcy Act, 1883, was held in *Ex p. Pratt (u)*, by Fry, L.J., to save proceedings pending under the Act of 1869, but to require all subsequent proceedings, even if founded on the earlier Act, to conform to the procedure laid down in the later Act (x). In *Quilter v. Mapleson (y)*, it was held that the provisions of the Conveyancing Act, 1881, giving lessees in certain events a means of obtaining relief against a forfeiture for breaches of covenant were retrospective, so as to be available in an action of ejectment pending when it came into force, and in which judgment had been given in the Court of first instance, but in which execution had been stayed. In *Dibb v. Walker (z)*, Chitty, J., treated section 25 of the Supreme Court of Judicature Act, 1873, as dealing with matter of procedure rather than as matter of right, and as plainly retrospective. And in *Kemp v. Wright (a)*, the Court treated section 10 of the Building Societies Act, 1894, as applicable to a society, dissolution of which began before but was not completed till after the commencement of the Act. In *The Ydun (b)*, it was held that the Public Authorities Protection Act, 1893, dealt with procedure only and was retrospective, and that an action was barred accordingly after six months from the date of default. In *R. v. Chandra Dharna (c)*, the Court for Crown Cases Reserved held that section 27 of the Prevention of Cruelty to Children Act, 1904, which substituted six months for three months as the limit of time for proceedings under section 5 of the Criminal Law Amendment Act, 1885, related to procedure, and applied to offences committed within three months of the date when it came into force (d). And in *Welby v. Parker (e)* it was held that section 1 (4)

(u) (1884), 12 Q. B. D. 334, 341. The retrospectivity of other sections of the Act has been discussed, e.g., s. 32 in *Bourke v. Nutt*, [1894] 1 Q. B. 725; and also the retrospectivity of ss. 6, 8, 23, 25, 26 of the Bankruptcy Act, 1890, in *Re Norman*, [1893] 2 Q. B. 369; *R. v. Griffiths*, [1891] 2 Q. B. 145; *Re Athlumney*, [1898] 2 Q. B. 547; *Re Raison* (1891), 60 L. J. Q. B. 256; *Hough v. Windus* (1884), 12 Q. B. D. 224 (Bankruptcy Act, 1883, s. 146).

(x) In statutes passed after 1889 the rule depends on s. 38 (2) of the Interpretation Act, 1889, *post*, Appendix B.

(y) (1882), 9 Q. B. D. 672.

(z) [1893] 2 Ch. 429, 433.

(a) [1895] 1 Ch. 121.

(b) [1899] P. 236. Cf. *Wright v. Hale* (1860), 6 H. & N. 227, 232, Wilde, B.

(c) [1905] 2 K. B. 335.

(d) If the three months' limit imposed by the Act of 1885 had expired before the commencement of the Act of 1904, the offender's prosecution would have been then barred by prescription, and the new Act would not, on coming into force, have destroyed a prescription already acquired.

(e) [1916] 2 Ch. 1.

of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which suspended the right of mortgagees to foreclose unless certain conditions were fulfilled, operated retrospectively, inasmuch as the Act suspended, as a war measure, a particular form of remedy normally open to mortgagees and therefore related merely to procedure.

A new class of legislation in the Finance Acts of recent years directed against tax evasion is free from any presumption against a retrospective effect. This is indicated in the judgment of the Court of Appeal delivered by Lord Greene, M.R., in *Lord Howard de Walden v. I. R. C.* (f). "The fact that the section (s. 18 of the Finance Act, 1936), has to some extent a retroactive effect appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who will understand the vigour of the contest."

Wills affected by statutes passed after date of execution. It was formerly held (g) that an Act of Parliament passed after a will has been made, but before the death of the testator, did not affect the will; but as by section 24 of the Wills Act, 1837 every will is now construed as taking effect as if it had been executed immediately before the death of the testator, if an Act of Parliament is passed after a will has been executed, but before the death of the testator, the will is affected by the Act. Such an Act has apparently, though not really, a retrospective effect. This was discussed in *Jones v. Ogle* (h), a case in which the effect of the Apportionment Act, 1870, was under consideration. "If it were necessary to decide [the point]," said Lord Selborne, "I should have very great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter or has in this case had the effect of altering the proper construction of words contained in a will made [but which had not come into effect] before the Act passed." In *Hasluck v. Pedley* (i), Jessel, M.R., held that a will made before the Apportionment Act, 1870, was affected by the Act. "It is said," said he, "that testators make their wills on the supposition that the state of the law will not be altered, and it is contended that this will ought to be construed as it would have been under the old law. The answer to this is that a testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law. Then it is said that the Act does not apply to specific devises, but I am of opinion that specific devises are as much under the law as any others (k). The Act does not affect the meaning of the will, it

(f) [1942] 1 K. B. 389, 398.

(g) See note (r) p. 374, *post*.

(h) (1873), L. R. 8 Ch. App. 192, 195; cf. *Capron v. Capron* (1874), 43 L. J. Ch. 677, 680, Malins, V.-C.

(i) (1875), L. R. 19 Eq. 271, 273.

(k) Cf. *Re Portal and Lamb* (1885), 30 Ch. D. 50.

only alters its legal operation.” Again, in *Constable v. Constable* (l), Fry, J., said, with regard to the effect of the Apportionment Act, 1870, upon a will made before it passed: “It would be a very narrow construction to hold that [the Act] did not apply to every instrument coming into operation after the passing of the Act.” The views expressed in these two cases were adopted by Davey, L.J., in *Re Bridger* (m). In *Re March* (n) a question arose as to the effect of the Married Women’s Property Act, 1882, upon a will made before the commencement of the Act by a married woman who died after the Act came into operation. Lindley, L.J., said: “The testatrix by her will, construed as it would have been when she made it, gave the appellant half her residuary estate. We can find nothing in the statute to alter this construction or to diminish the share given to him.” And the Court declined to give the Act a retrospective operation in the absence of any express words or necessary implication. But in the later case of *Re Bridger* (o) the Court held that the Mortmain and Charitable Uses Act, 1891, applied to a will made before the Act by a person dying after its passing. Lindley, L.J., treated the cases of *Jones v. Ogle* and *Re March* as good law, and said, “An extension, whether by a statute or otherwise, of a testator’s power of disposition in the interval between the making of the will and his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it would have previously applied to.” In *Re Bowen* (p), Chitty, J., held that a will made by a married woman during coverture and before the coming into operation of the Married Women’s Property Act, 1882, was effectual without re-execution to pass separate property acquired by her under that Act. And in *Re Wylie* (q), Romer, J., held that section 3 of the Married Women’s Property Act, 1893, applied to the will of every married woman who died after the passing of the Act, whether the will was made before or after the passing of the Act (r). The Accumulations Act of 1892, has been held to apply to a will made before but coming into operation after the passing of the Act, on the ground that the Thellusson Act of 1800 was retrospective and the Act of 1892 adopts the same phraseology (s).

Duration of Statutes.

3. *Duration presumably perpetual.* Every statute for which no time is limited is called a perpetual Act, and continues in force

(l) (1880), 11 Ch. D. 681, 685.

(m) [1894] 1 Ch. 297, 302.

(n) (1885), 27 Ch. D. 166, 170.

(o) [1894] 1 Ch. 297, 302. Cf. *Re Yates*, [1919] P. 93 (sailor’s will).

(p) [1892] 2 Ch. 291.

(q) [1895] 2 Ch. 116.

(r) See also *Re Hayes*, [1900] 2 Ch. 332, as to the effect of ss. 24, 27 of the Wills Act, 1837, on a will giving a power of disposition subsequent in date to a will purporting to exercise the power. As to the rule before the Wills Act, see *Ashburnham v. Bradshaw* (1740), 2 Atk. 36.

(s) *Re Baroness Llanover*, [1903] 2 Ch. 330.

until it is repealed. "No doubt exists," said Dr. Lushington in *The India* (t), "that a British Act of Parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force, but the fact of non-user may be extremely important when the question is whether there has been a repeal by implication" (u). So again in *Hebbert v. Purchas* (x) the Judicial Committee observed that "it is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute." This principle appears equally applicable to English, Irish, and Colonial Acts, and the term "obsolete" cannot therefore strictly be applied to any such Acts (y).

Forgotten and effete Acts. But there are statutes to be found in the Statute-book which have never been acted upon since they were passed and which apparently are only permitted to remain unrepealed because their existence has been forgotten (z). For instance, 13 Chas. 2, c. 5, enacts that every one commits a misdemeanour and is liable to a penalty who procures the signatures of more than twenty persons to a petition to the King or to Parliament without the previous permission of the justices or of the grand jury. "This singular provision," said Sir James Stephen (*Digest of Criminal Law*, p. xxxi), "obviously exists only because it is forgotten."

Effect of contrary practice or non-user. Although a British statute cannot be actually repealed by contrary practice or non-user (a), yet its effect may be materially altered thereby. Thus, in *Leigh v. Kent* (b), a motion was made to stay the proceedings in the cause on the ground that no affidavit had been filed in accordance with the provisions of 21 Jas. 1, c. 4, s. 2. As to this objection, Lord Kenyon said on discharging the motion: "I think no such affidavit is necessary; it has never been usual to take that step. And though, where the words

(t) (1864), 33 L. J. Adm. 193.

(u) An instance of this was the appointment by Mr. Gladstone of suffragan bishops of Dover and Nottingham under 26 Hen. 8, c. 14. No suffragan bishop had been appointed under this statute since the reign of Queen Elizabeth. See *Life of Archbishop Parker*, by Dean Hook, p. 450.

(x) (1870), L. R. 3 P. C. 605, 650.

(y) In *Dobbs v. Grand Junction Waterworks* (1882), 10 Q. B. D. 337, 355, Lindley, L.J., said: "The real truth is that the greater portion of s. 27 [of 7 Geo. 4, c. cxl] has become obsolete." But this term was inaccurate if it was intended as an equivalent for "tacitly repealed."

(z) Daines Barrington, in his *Observations on the Statutes* (3rd ed.), p. 40, points out that 20 Hen. 3, *Statutum Hiberniæ de coheredibus* (which remained unrepealed until the passing of the Statute Law Revision Act, 1863), is marked *obsolete* in all the editions of the statutes. See Carr, *Delegated Legislation*, pp. 11, 12.

(a) As to Scottish desuetude see *ante*, p. 4. As to non-user, the *discours préliminaire* of the Code Napoléon runs as follows: "Si nous n'avons pas formellement autorisé le mode d'abrogation par la désuétude ou le non usage c'est qu'il est peut-être été dangereux de la faire. Mais peut on se dissimuler l'influence et l'utilité de ce concert délibéré de cette puissance invisible par laquelle sans secousse et sans commotion les peuples se font justice des mauvaises lois et qui semblent protéger la société contre les surprises faites au législateur contre lui-même." On this principle the Courts have been astute to defeat proceedings to enforce the Lord's Day Act (29 Chas. 2, c. 7). See *Reid v. Wilson*, [1895] 1 Q. B. 315

(b) (1789), 3 T. R. 362, 364.

of an Act of Parliament are plain, it cannot be repealed by non-user, yet where there has been a series of practice without any exception, it goes a great way to explain them where there is any ambiguity."

Meaning of "Perpetual" Acts. No statute can be absolutely perpetual, that is to say, incapable of being repealed (c), for "... though divers Parliaments have attempted to bar, restrain, suspend, qualify, or make void subsequent Parliaments, yet could they never effect it, for the latter Parliament hath even power to abrogate, suspend, qualify, explain, or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition, or penalty in the former, for it is a maxim in the law of Parliament, *Quod leges posteriores priores contrarias abrogant*" (d). Formerly there was one supposed exception to this rule, namely, that a statute could not be altered by any Act passed in the same session (e); but that exception was removed in 1850, since which date "any Act may be altered, amended, or repealed in the same session of Parliament" (f).

If an Act contains a proviso that it is to continue in force only for a certain specified time, it is called a temporary Act (g).

Temporary Acts; peculiar characteristics. In *Bowles v. Att.-Gen.* (h), Parker, J., said: "It appears certain that the income tax was originally imposed as and was intended to be a temporary tax only and the Acts regulating its collection have always been so drawn as to expire automatically (except as to arrears) at the end of the period of such imposition. If re-imposed at the end of the period, the Acts were revived and continued by the Act re-imposing the tax but again only for the period of re-imposition. The tax is still, as a matter of form, imposed as a temporary tax only, the period of imposition being for one year." Temporary Acts have the following peculiarities:—

(i) *Commencement.* If an Act is in the first instance temporary, and is continued from time to time by subsequent Acts, it is considered as a statute passed in the session when it was first passed, and not as a statute passed in the session in which the Act which continues its operation was passed. This was so held in *Shipman v. Henbest* (i), where (*inter alia*) it had been contended that 21 Jas. 1, c. 4, s. 4, which enabled a defendant, sued on any penal statute passed before 21 Jas. 1, to plead the general issue and to give special matter in evidence under it, did not apply to an action brought upon 1 Jas. 1, c. 22, because that statute, although originally passed before 21 Jas. 1, was

(c) See Dicey: Constitution, 9th ed., p. 64.

(d) 1 Co. Inst. 43.

(e) See p. 321, *ante*.

(f) Interpretation Act, 1889, s. 10 *post*, Appendix B, re-enacting s. 1 of Lord Brougham's Act (13 & 14 Vict. c. 21).

(g) See p. 61, *ante*. An annual register of temporary laws in force together with the period of their duration is issued as a House of Commons Paper. Standing Order 56 of the House of Commons (1948) requires that the precise duration of every temporary law or enactment shall be expressed in a distinct clause at the end thereof.

(h) [1912] 1 Ch. 123, 132. Cf. *Bowles v. Bank of England*, [1913] 1 Ch. 57, 86.

(i) (1790), 4 T. R. 109, 114.

only a temporary Act to continue to the next session of the next Parliament, and that in the next Parliament—viz., 6 Jas. 1—it was not continued, nor was it continued again till after the passing of 21 Jas. 1, c. 4. But as to this contention, Lord Kenyon said: "It has been argued that the 21 Jas. 1 does not extend to Acts passed subsequent to it, and that this may be considered as an action brought on a subsequent statute; the 1 Jas. 1, c. 22, having expired before the 21 Jas. 1, and has been only re-enacted since that time; but on this point I have not entertained a doubt from the beginning. We are all most clearly of opinion that this must be considered as an action on the 1 Jas. 1, c. 22; and that the subsequent laws, which have continued it from time to time, all give effect to it as an Act made in the first year of James I" (j). This doctrine seems not to have been accepted in *R. v. Phipoe* (k), where it was contended that an indictment founded on the temporary Act of 2 Geo. 2, c. 25, s. 3 (which Act was revived by 9 Geo. 2, c. 18), ought to have concluded in the plural number, "against the form of the statutes in such case made and provided"; but it was held otherwise, because it was considered that the *re-enacting* statute was the only statute in force against the offence. This ruling is, however, contrary to the opinion expressed by the Judges in *Dingley v. Moor* (l), where, on a similar point having been raised, it was said that, "there ought to be a difference observed when a statute is made to endure for a certain time and is afterwards made perpetual by a new Act or made perpetual in part and where it is continued with a new addition (m); for where a statute is made perpetual in part or in whole without any new addition, the offence may well be supposed against the form of the first statute, for that Act is made to continue." And the rule as laid down by Lord Kenyon (*supra*) has been adopted by the Statute Law Revision Acts, which usually provide that the enactments set out in a schedule are repealed, but where any enactment not comprised in the repeal schedule "has been repealed, confirmed, revived, or perpetuated by an enactment thereby repealed such repeal, confirmation, revivor, or perpetuation shall not be affected by the repeal effected by this [Revision] Act" (n).

(ii) *Expiration*. As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect (o). Therefore, offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a

(j) See also *R. v. Morgan* (1736), 2 Str. 1066; and *R. v. Swiny* (1832), Alc. & N. 131, 132, Jebb, J.

(k) (1795), 2 Leach C. C. 673.

(l) (1601), Cro. Eliz. 750, Popham, C.J.

(m) Cf. *Re Ashcroft* (1887), 19 Q. B. D. 186, 195.

(n) See Statute Law Revision Act, 1889, s. 2. These Acts are repeated more or less annually, e.g., 1938, 1939, 1941, 1942, 1944, 1945, 1946, 1947. S. L. R. Acts of 1948 and 1950 contain this provision in sec. 1 (1).

(o) See p. 379, *post*.

person will *ipso facto* terminate (*p*). In *Spencer v. Hooton* (*q*), Roche, J., held he had no jurisdiction to hear appeals from Munitions Tribunals in proceedings taken under the Wages (Temporary Regulation) Acts 1918, 1919 by reason of the Act giving him jurisdiction having expired (on September 20, 1920), before the appeals came on for hearing.

The difference between the effect of the expiration of a temporary Act and the repeal of a perpetual Act, is pointed out by Parke, B., in *Stevenson v. Oliver* (*r*). "There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed (*s*) under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions are matters of construction." The case related to 6 Geo. 4, c. 133, s. 4, which enacted that every person who held a commission as surgeon in the army should be entitled to practise as an apothecary without having passed the usual examination. This Act was temporary, expiring on August 1, 1826; and it was contended that a person who under the Act was entitled to practise as an apothecary would lose his right after August 1, 1826. But the Court held that such a person would not be so deprived of his right, and Lord Abinger, C.B., in giving judgment, said: "It is by no means a consequence of an Act of Parliament expiring that rights acquired under it should likewise expire. The Act provides that persons who hold such commissions should be entitled to practice as apothecaries, and we cannot engraft on the statute a new qualification limiting that enactment."

This case and *Spencer v. Hooton* (*supra*) were considered and applied in a more recent case, *R. v. Wicks* (*t*). There was a charge under the Defence (General) Regulations, 1939, regulation 2A, and the Emergency Powers (Defence) Act, 1939, section 3, of assisting the enemy. The Emergency Powers Act expired on February 24, 1946. The trial took place on May 27 and 28, 1946. The Acts which formed the subject of the charge took place from April, 1943 to January, 1944. The Emergency Powers Act provided (section 11 (3)) that its expiry

(*p*) O'Connell pleaded guilty to an offence against the temporary Act, 10 Geo. 4, c. 1, but before he had been sentenced the Act expired; consequently, no further proceedings could be taken against him as to that matter. See this point discussed in the Life of the Right Hon. Francis Blackburne, by his son (Macmillan, 1874), pp. 86—94. It had been previously said by Sir Archibald Alison (History of Europe, iv, 299) that the prosecution of O'Connell had been abandoned by Lord Grey's Government on political grounds, but Blackburne, in a correspondence with Alison, which is quoted in the Life, pointed out that the sole ground why O'Connell was not sentenced was in consequence of the expiration of the temporary Act making it impossible to take any further proceedings.

(*q*) (1920), 37 T. L. R. 280, 282.

(*r*) (1841), 8 M. & W. 234, 240, 241.

(*s*) Or rights or liabilities accrued. See p. 324, *ante*.

(*t*) (1946), 62 T. L. R. 674, *affd. sub nom. Wicks v. Director of Public Prosecutions* [1947] A. C. 362.

should not affect its operation as to things previously done or omitted to be done. This language was held to be wide enough to make the provisions of the statute operate in respect of any Act done before its expiration; therefore its expiration did not affect the liability to punishment under the statute or the prosecution of legal proceedings for the purpose of inflicting that punishment.

(iii) *Continuance*. It is now the practice to pass an Expiring Laws Continuance Act (u) each session, and to put into a schedule all temporary Acts by name which it is intended to continue. Formerly, however, it was the common practice of the Legislature to pass a general Act to continue all the temporary Acts relating to some particular subject, but without specifying the particular Acts to which it was intended to relate. This practice led in several cases to confusion, from the question arising as to whether or not it was the intention of the Legislature to include some particular Act amongst those to be continued. Thus, in *Barnes v. White* (x), it appeared that an Act for amending the roads and highways of the Isle of Wight empowered commissioners to borrow money on the tolls, but the Act was only temporary, and it was argued that 4 & 5 Will. 4, c. 10, which enacted that "all and every Act and Acts for making, amending, and repairing any turnpike roads in Great Britain which will expire with the present or next session of Parliament is and are hereby continued," did not include the above-mentioned Act, because the Act was not merely a statute for making, amending, and repairing turnpike roads, but for something more. The Court ultimately decided that the temporary Act in question was intended to be continued: but the question could never have been raised had the Legislature done what is now usual in Expiring Laws Continuance Acts, namely, put into a schedule the different Acts or parts of Acts intended to be continued.

Effect of expiration of Act before the passing of a Continuance Act. It is provided by the Act of Parliament Expiration Act, 1808, that: "Where any bill may have been or shall be introduced into this present or any future session of Parliament for the continuance of any Act which would expire in such sessions, and such Act shall have expired before the Bill for continuing the same shall have received the royal assent, such continuing Act shall be deemed or taken to have effect from the date of the expiration of the Act intended to be continued as fully and effectually, to all intents and purposes, as if such continuing Act had actually passed before the expiration of such Act; except it shall be otherwise provided in such continuing Act: Provided, nevertheless, that nothing herein contained shall extend or be construed to affect any person or persons with any punishment, penalty, or forfeiture whatsoever by reason of anything done or omitted to be done by any such person or persons contrary to the provisions of the

(u) See, e.g., 11 & 12 Geo. 5, c. 53, 14 & 15 Geo. 6, c. 1 (1950), and annually since.

(x) (1845), 14 L. J. M. C. 65.

Act so continued between the expiration of the same and the date at which the Act continuing the same may have received or shall receive the royal assent."

(iv) *Revivor*. It is now rare to revive an expired Act. The only modern instance is the revival of the Aliens Act, 1848, by the Prevention of Crime (Ireland) Act, 1882, s. 15. If an expired Act is revived, Acts passed for the purpose of explaining or amending the expired Act are by implication revived also (v).

Repeal of statutes.

4. *Total repeal obliterates statute, except as to transactions past and closed*. "When an Act of Parliament is repealed" (z), said Lord Tenterden in *Surtees v. Ellison* (a), "it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule." Tindal, C.J., states the exception more widely. He says (b): "The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law." This rule is recognised in section 38 (2) of the Interpretation Act, 1889 (c). In order to decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was complete or incomplete at the time the Act was repealed. Thus, if an Act gives a right to do anything, the thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left *in statu quo*. In *R. v. Mawgan (Inhabitants)* (d) a presentment as to the non-repair of a highway had been made under 13 Geo. 3, c. 78, s. 24, but before the case came on to be tried, the Act was repealed; consequently no further proceeding could be taken. "If," said Lord Denman, C.J., "the question had related merely to the presentment, that no doubt is complete. But *dum loquimur*, we have lost the power of giving effect to anything that takes place under that proceeding." And Littledale, J., added: "I do not say that what is already done has become bad, but that no more can be done." Thus in *R. v. Swan* (e), it was held that where

(y) See *Williams v. Rougheed* (1759), 2 Burr. 747.

(z) As to the effect of the repeal of Acts, see also pp. 326, 330, *ante*.

(a) (1829), 9 B. & C. 750, 752.

(b) In *Kay v. Goodwin* (1830), 6 Bing. 576, 582; cited in *Lemm v. Mitchell*, [1912] A. C. 400, 406.

(c) *Post*, Appendix B, and see p. 323, *ante*; *Hough v. Windus* (1884), 12 Q. B. D 224; and *Re Ilfracombe Permanent Mutual Benefit Building Society*, [1901] 1 Ch. 102, where a question arose as to the legal position of a society established and certified under the Benefit Building Societies Act, 1836, but never incorporated; and on the repeal of that Act, held to fall within the class of societies forbidden by s. 4 of the Building Societies Act, 1894.

(d) (1838), 8 A. & E. 496, 501, but see *Hough v. Windus*, *supra*, and p. 381, *post*

(e) (1849), 4 Cox C. C. 108.

a statute creating an offence is repealed a person cannot afterwards be charged for an offence within it committed whilst it was in operation, even though the repealing statute re-enacts the penalty clauses of the statute repealed. So, if by virtue of some statute a right becomes vested upon the completion of some certain transaction *but not before*, no right whatever will have been acquired if the statute in question is repealed before the transaction is complete (*f*). In *Gwynne v. Drewitt* (*g*) a question arose as to the effect of the repeal in 1856 of a Turnpike Act passed in 1819 for twenty-one years, and subsequently continued till 1856. The Act of 1819 provided for stopping up a bridleway to prevent evasion of tolls, and vesting the soil in the owner of the land over which it passed, in exchange for land taken from him for the purposes of a turnpike road to be used in substitution for the bridleway. Romer, J., said: "The Act of 1856, which repeals the Act of 1819, had not, in my opinion, the effect at all of reviving the old ways which had been stopped up and discontinued. The effect of section 51 of the Act of 1819 is this—that the old ways there referred to were stopped up and discontinued, in my judgment, for ever. When the Act of 1856 was passed, and the Act of 1819 repealed, it was not, in my judgment, at all the intention of the Legislature or the effect of the Act of 1856 to undo that which had already been done during the continuance of the prior Act, or to revive these ways which had once for all been discontinued and put an end to as private ways." In *New Windsor Corporation v. Taylor* (*h*) it was held that the repeal of a statute which had extinguished an ancient franchise to take bridge tolls did not revive the franchise. In *Charrington v. Meatheringham* (*i*) it appeared that by 13 Geo. 3, c. 78, s. 81, any person who brought an action for an illegal distress for rates under the Act, and was non-suited, was liable to pay to the defendant treble costs. The plaintiff in this case had been non-suited, but as judgment was not signed before the repeal of the Act, it was held that the defendant had not acquired a right to the treble costs. But in *Hough v. Windus* (*k*) it was held that when a creditor had obtained a writ of *elegit* under 13 Edw. 1, c. 18, after the passing of the Bankruptcy Act, 1883 (which enacted that a writ of *elegit* should not extend to goods), but before it came into force, and the sheriff had executed the writ before January 1, 1884, the date of commencement of the Bankruptcy Act 1883, the creditor's right to delivery of the goods under the old law was not taken away by the Act of 1883, ss. 146, 169, of which repealed the statute (13 Edw. 1, c. 18) under which writs of *elegit* issued. If an offence is punishable under some certain statute, and the statute is repealed after the offence has been committed, but before the trial has taken place and the sentence pronounced, no punishment can be

(*f*) See *Macmillan v. Dent*, [1907] 1 Ch. 107, 124, p. 320, *ante*.

(*g*) [1894] 2 Ch. 616, 620.

(*h*) [1899] A. C. 41, 45.

(*i*) (1837), 2 M. & W. 142, 228.

(*k*) (1884), 12 Q. B. D. 224, 231, Selborne, L.C., said the right of the plaintiff was preserved by the savings in the Act of 1883.

inflicted by virtue of that statute, unless, as the Court said in *Miller's Case* (l), the repealing Act contained "a special clause to allow it." On this ground it was held in *R. v. M'Kenzie* (m), that if an offence was punishable under some certain statute, and was committed before, but not tried till after, the passing of an Act which repealed that statute but imposed new penalties for the commission of the offence, the offence was not liable to be punished under either the repealed or the repealing statute (n). In the case of Acts passed after 1889 the presumption has been altered, and unless a contrary intention appears the remedies under the repealed Acts for offences committed before the repeal are not barred (o).

Repeal of statute repeals bylaws made under it. When a statute is repealed any bylaw made thereunder ceases to be operative unless there is a saving clause in the new statute preserving the old bylaw. So where under the powers of a local Act a corporation had made bylaws for regulating the use of bicycles in streets and afterwards the local Act was repealed by the Local Government Act, 1888, it was held that the bylaws made under the local Act thereby ceased to be operative and were in effect repealed (p).

Partial repeal. It must be borne in mind that there is a difference in effect between repealing an entire Act and merely repealing a single clause in an Act. It may no doubt be said that, if a clause is repealed, "this clause is to be taken as if it had never existed," but it cannot be said that "where a particular clause in an Act is repealed, the whole Act must be read as if that clause had never been enacted" (q). For every Act of Parliament is in the first instance to be looked at as an entirety, and is to be construed *ex visceribus actus* (r). Therefore a Court of law is entitled to look at the repealed portion of an Act to see what is the meaning of what remains of the Act, otherwise "this consequence would follow that an Act of Parliament, which at one time had one meaning, would by the repeal of some one clause in it have some other meaning." In the same case Cotton, L.J., said: "The effect of this (repeal) is that the portion of the schedule (to 52 Geo. 3, c. 150) so repealed is no longer operative for the purpose of imposing any tax. But for the purpose of construing words of reference, that is for the purpose of seeing what is meant by the words in the tail of the schedule, 'all other waters,' etc., I am of opinion that we must look at what goes before, though no longer operative" (s).

(l) (1764), 1 W. Bl. 450; 3 Wils. 420.

(m) (1820), R. & R. 429.

(n) See note (p), p. 378, ante. Cf. *Ex p. Grisewood* (1859), 4 De G. & J. 544; 28 L. J. Ch. 769.

(o) Interpretation Act, 1889, s. 38, sub-s. 2, post, Appendix B. For the existence of "contrary intention" see *Hosie v. Kildare C. C.*, [1928] Ir. R. 47 and *Henshall v. Porter* (1922), 39 T. L. R. 409, 410, McCardie, J.

(p) *Watson v. Winch*, [1916] 1 K. B. 688.

(q) *Att.-Gen. v. Lamplough* (1878), 3 Ex. D. 214, 223, Kelly, C.B.

(r) See p. 93, ante.

(s) *Att.-Gen. v. Lamplough*, supra, at p. 227, Bramwell, L.J., and at p. 234, Cotton, L.J.; *Chapman v. Kirke*, [1948] 2 K. B. 450, 455, Denning, J.; *Smith v. London Transport Executive*. [1949] 2 A. E. R. 295, 304, Somervell, L.J.

Rights acquired by virtue of statute not lost by its repeal. If a right has once been acquired by virtue of some statute, it will not be taken away by the repeal of the statute under which it was acquired. "The law itself," says Puffendorf, in his "Law of Nature and Nations," bk. 1, c. 6, s. 6, "may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain; for together with a law to take away all its precedent effects would be a high piece of injustice." Thus, in *Jacques v. Withey* (t), it appeared that it being illegal, by virtue of 22 Geo. 3, c. 47, to insure tickets in a lottery, a contract for insuring lottery tickets was void, and that, consequently, any money which had been paid in pursuance of such a contract might be recovered back. After a contract of this kind had been entered into, and after money had been paid by the plaintiff to the defendant in pursuance of it, 22 Geo. 3, c. 47, was repealed; consequently, it was argued that, as such contracts were no longer illegal, the money which had been paid before the repeal of the Act could not be recovered back in an action which had not been commenced until after the repeal of the Act. It was held, however, that a contract which was void by statute when made, could not be set up again by the repeal of the statute between the time of contracting and the commencement of the suit. "If," said Coleridge, J., in commenting on this case in *Hitchcock v. Way* (u), "it had been originally a good contract, and a statute had passed which had made it void, and then that statute had been repealed, the contract would have been set up again. But here there was *originally a void contract* by virtue of a statute, and therefore it cannot be made valid by the repeal of that statute" (x).

To the same effect is *Lemm v. Mitchell* (y). In that case it appeared that a Hong-Kong Ordinance of 1895 had abolished the action for criminal conversation but that a later Ordinance of 1908 had repealed the Ordinance of 1895 and had by its retroactive effect given a right of action for criminal conversation committed before the enactment of the Ordinance of 1908. The respondent after 1908 brought an action for criminal conversation committed before 1908, but it appeared that he had already brought such an action before the enactment of 1908, and judgment had been given against him founded on the then state of the law; and it was held that this judgment had given the defendant a vested right which was a bar to an action for the same cause brought after the enactment of 1908. It could not have been intended by the Ordinance of 1908 not only to alter the previous law but also "to deprive a litigant of a judgment rightly given and still subsisting."

Sometimes when an Act is repealed it is expressly enacted in the

(t) (1788), 1 H. Bl. 65.

(u) (1837), 6 A. & E. 943, 947.

(x) See p. 130 *et seq. ante*, as to reference for purposes of construction to repealed Acts *in pari materia*.

(y) [1912] A. C. 400, 406.

repealing Act and "this repeal shall not affect any right or liability acquired, accrued, or incurred." But as the rule of law is as above stated, such a clause as this is apparently unnecessary, and only inserted *ex abundanti cautela*; and this is now the general canon of construction as to repeals made after 1889 (z).

Repeal ex abundanti cautela. Express repeals are in some cases inserted *ex abundanti cautela*, and to confirm and corroborate the effect of enactments contained in the repealing Act or some prior statute upon the enactment expressly repealed. Thus, in *Hough v. Windus* (a), it was held that section 146 of the Bankruptcy Act, 1883, repealed the Statute of Westminster the Second (13 Edw. 1, c. 18) as to writs of *elegit* as regards the chattels of the debtor. Also that section 169, the repealing section, must be read with section 146, and that, consequently, the savings in section 169 (*i.e.*, that the repeal was not to affect anything done before the commencement of the Act of 1883 under any enactment repealed by it) did not operate to cut down the extent of the repeal effected by section 146 so far as related to the rights of creditors who had obtained writs of *elegit* between the passing and the commencement of the Act of 1883. "There are no words in section 146 which expressly say or from which it can (to my mind) be reasonably inferred that any such rights as are saved by section 169 were intended to be taken away in the particular case of creditors who had obtained writs of *elegit* before January 1, 1884. . . . The execution creditor had, under those words of that statute (of 13 Edw. 1), while unrepealed acquired a right to the delivery of the goods seized and a duty was imposed by the same words upon the sheriff to deliver them to him. That right and that duty are in my opinion expressly preserved." Thus savings from a repealing clause do not apply to any express antecedent provision inconsistent with them (b), and Bowen, L.J., added, "It does not seem to me possible without misunderstanding the scheme of drafting which the legislature has adopted to treat the repealing section 169 as an independent section, or one intended to do more than for the sake of symmetry to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act" (c).

Effect of proviso "except as to acts done under repealed Act." If an Act is repealed with a proviso, "except as to acts done under it," this proviso will receive a liberal interpretation, and will be extended to any act which a person *bona fide* believes he was entitled to do under and by virtue of the repealed statute, even though it eventually appears that he acted wrongly. Thus, section 139 of the County Courts Act, 1846, enacted that no costs should be awarded to the plaintiff in any action against a county court bailiff in respect

(z) Interpretation Act, 1889, s. 38 (2), Appendix B, *post*, p. 323, *ante*.

(a) (1884), 12 Q. B. D. 224.

(b) *Ibid.* at pp. 231, 232, Lord Selborne, L.C.

(c) *Ibid.* at pp. 235, 236.

of any grievance committed "by him under colour of the process of the Court," unless the plaintiff recovered more than £20 damages or the Judge certified. This section was repealed by the County Courts Act, 1856 (19 & 20 Vict. c. 108) "except as to acts done under it." In *Foster v. Pritchard* (d) it was contended with respect to an action tried after the passing of 19 & 20 Vict. c. 108 (in which the plaintiff recovered less than £20 damages and the Judge did not certify), that the grievance (trespass) committed by the defendant under colour of the process of the Court was not "an act done under" this repealed section. But, said the Court, "there can be no doubt that it was the intention of the Legislature that the words in this proviso as to 'acts done under' the repealed statutes should be construed in an extensive sense. . . . The words 'done under' may mean 'done while a statute is in operation' (e). The words 'under and subject to' would, it must be admitted, have rendered this construction indisputable, and, under the circumstances, we think that the word 'under' should have this meaning."

Provisions of prior Act adopted by relation in later Act not repealed by repeal of prior Act. Sometimes an Act of Parliament, instead of expressly repeating the words of a section contained in a former Act, merely refers to it, and by relation applies its provisions to some new state of things created by the subsequent Act (f). In such a case the "rule of construction is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second" (g). This was first expressly decided in *R. v. Merionethshire (Inhabitants)* (h). In that case it appeared that under 43 Geo. 3, c. 59, s. 1, the surveyor of bridges might take materials for the repair of bridges in the same manner as the surveyors of highways are authorised to take materials by 13 Geo. 3, c. 78 (i), and that "the several powers thereby vested in the surveyor of highways shall be, and the same are hereby, vested in the surveyor of bridges . . . as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." 13 Geo. 3, c. 78, was repealed by 5 & 6 Will. 4, c. 50, s. 1, and the question arose as to what effect the repeal of the former Act had on the above-mentioned provisions of the latter Act. Lord Denman, C.J., said: "There is certainly a difficulty in applying the clauses which have been cited. . . . The question is whether

(d) (1857), 26 L. J. Ex. 215.

(e) *Ibid.* p. 216, per Bramwell, B.

(f) 31 & 32 Vict. c. 50 applies the provisions of 28 & 29 Vict. c. 84; this latter Act is repealed by 40 & 41 Vict. c. 53, s. 72, but was printed in the Supplement to vol. xv of the Revised Statutes (1st ed.) as being still in force through 31 & 32 Vict. c. 50. It is omitted from the second Revised edition of the Statutes.

(g) Per Brett, L.J., in *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 69. And see per Coleridge, J., in *Jenkins v. Great Central Ry.*, [1914] 1 K. B. 1, 8.

(h) (1844), 6 Q. B. 343, 346, 347.

(i) This Act was omitted from its proper place in the Revised edition of the Statutes, but in consequence apparently of the decision in *R. v. Smith* (1873), L. R. 8 Q. B. 146 (cited below), it was printed in the Appendix to vol. iv of the Revised Statutes (1st ed.). It is omitted from the second Revised edition of the Statutes.

43 Geo. 3, c. 59, which is unrepealed, does not keep alive the power given by 13 Geo. 3, c. 78, s. 64. And I think it must be taken to do so." Williams, J., said: "It certainly appears strange that when an Act of Parliament is *per se* abolished, it shall virtually have effect through another Act. But any difficulty which that may raise is met by the manner in which the earlier Act is introduced in 43 Geo. 3, c. 59, 'as if the same . . . were herein repeated and re-enacted.' To save the trouble of incorporating it in terms they do so by relation, but the provisions are made part of 43 Geo. 3, c. 59, as much as if they were expressly incorporated." The doubts expressed by the Court in this case do not appear to have been felt in subsequent cases (*k*) where the same question arose. Thus 32 & 33 Vict. c. 27, s. 8, enacted that "all the provisions of 9 Geo. 4, c. 61, as to appeal to quarter sessions from any act of any justice, shall have effect with respect to the grant of certificates under this Act." By 35 & 36 Vict. c. 94, s. 75, all the provisions of 9 Geo. 4, c. 61, as to appeal to quarter sessions were repealed. In *R. v. Smith* (*l*), a case on these Acts, no attempt was made to dispute the principle laid down in *R. v. Merionethshire (Inhabitants)* (*m*), and the only question raised was as to whether the form of words used in 32 & 33 Vict. c. 27 did actually incorporate the provisions of 9 Geo. 4, c. 61. The Court adopted the principle laid down in *R. v. Merionethshire* (*m*). "I agree," said Blackburn, J., "that the authorities show that the repeal of the original Act does not of itself repeal provisions as incorporated in a subsequent Act, and without authorities it is but common sense that, where a second Act in effect re-enacts an older Act, the second Act must be expressly repealed as well as the older Act, otherwise it must be taken to remain in force." Lord Cairns' Act (21 & 22 Vict. c. 27) was repealed by the Statute Law Revision Act, 1883, s. 3, but that repeal was not intended to take away any of the powers given by the Act in a Chancery action. Lord Esher, M.R., said (*n*): "It is true that Lord Cairns' Act has been repealed since the passing of the Judicature Acts by 46 & 47 Vict. c. 49, section 3, but I am confident that the repeal was not with the intention of taking away any of the powers given by the Act in a Chancery action but because it was considered that the Judicature Acts re-enacted those powers and therefore that Lord Cairns' Act had become obsolete and might be repealed."

Repealed Act may be revived by express enactment. Although an Act of Parliament, after it has been repealed, must "be considered as if it had never existed" (*o*), this rule does not prevent its being revived. Until 1850 the rule adopted with regard to the revival of

(*k*) See *R. v. Brecon* (1849), 15 Q. B. 813; *R. v. Stepney Union* (1874), L. R. 9 Q. B. 383, 390; *Clarke v. Bradlaugh* (1881), 8 Q. B. D. 63, 69, Brett, L.J.

(*l*) (1873), L. R. 8 Q. B. 146, 151.

(*m*) (1844), 6 Q. B. 343.

(*n*) *Chapman, Morsons & Co. v. Auckland Guardians* (1889), 23 Q. B. D. 294, at p. 299.

(*o*) *Ante*, p. 380.

repealed Acts of Parliament was that laid down in 2 Co. Inst. 686, viz., that "as by the repealing of a repeal the first Act is revived, so by reviving of an Act repealed the Act of repeal is made of no force." But the present rule, now embodied in section 11 (1) of the Interpretation Act, 1889 (*p*), is that where an Act passed after the year 1850 repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed unless words are added reviving that enactment.

The object of section 5 of Lord Brougham's Act was, as Hannen, J., pointed out in *Mirfin v. Attwood* (*q*), "to prevent the revival of a statute contrary to the intention of the Legislature," and it apparently applies to cases of implied repeal as well to repeals by express enactment.

Repeal by a temporary Act may be absolute or temporary. If an Act which repeals an earlier Act is itself only a temporary Act, the general rule is that the earlier Act is revived after the temporary Act is spent; and inasmuch as *ex hypothesi* the temporary Act expires and is not repealed, the rules of construction laid down by sections 11 (1) and 38 (2) of the Interpretation Act, 1889 (*r*), do not apply. But there will be no revivor if it was clearly the intention of the Legislature to repeal the earlier Act absolutely. Thus, in *Warren v. Windle* (*s*), it was argued that a temporary Act (26 Geo. 3, c. 108), which repealed 19 Geo. 2, c. 35, having itself expired, 19 Geo. 2, c. 35, revived; but, said Lord Ellenborough, C.J., "that would not necessarily follow, for a law, though temporary in some of its provisions, may have a permanent operation in other respects. 26 Geo. 3, c. 108, professes to repeal 19 Geo. 2, c. 35, absolutely, though its own provisions, which it substituted in the place of it, were to be only temporary." This view was adopted by Collins, L.J., in *New Windsor Corporation v. Taylor* (*t*), where one of the questions for determination was whether an Act of 1734, extinguishing a franchise then existing by prescription, was absolutely or only temporarily repealed by a temporary Act of 1819, which, after divers continuances, was allowed to expire in 1867. And his opinion appears to have been adopted by Lord Davey in the same case in the House of Lords (*u*). But when it was argued in *R. v. Rogers* (*x*) that certain parts of 42 Geo. 3, c. 38, having been repealed by a temporary Act (46 Geo. 3, c. 139), did not revive upon the expiration of the temporary Act, Lord Ellenborough said as follows: "It is a question of construction upon every Act professing to repeal or interfere with the provisions of a former law, whether it

(*p*) *Post*, Appendix B, re-enacting s. 5 of Lord Brougham's Act (13 & 14 Vict. c. 21).

(*q*) (1869), L. R. 4 Q. B. 330, 340.

(*r*) See p. 323, *ante*.

(*s*) (1803), 3 East 205, 211.

(*t*) [1898] 1 Q. B. 186, 205.

(*u*) [1899] A. C. 41, 50. Cf. *Lauri v. Renad*, [1892] 3 Ch. 402, 420, Lindley, L.J.

(*x*) (1809), 10 East 569, 573.

operate as a total or partial and temporary repeal. Here the question is whether the provisions of 42 Geo. 3, c. 38, which was originally perpetual be entirely repealed by the 46 Geo. 3, c. 139, or only repealed for a limited time. The last Act recites, indeed, that certain provisions of the former one should be repealed, but this word is not to be taken in an absolute sense, if it appear upon the whole Act to be used in a limited sense."

CHAPTER VII

EFFECT OF STATUTES ON THE CROWN

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References to the Crown.

1. References in a statute to the Sovereign reigning at the time of its passing, or to the Crown, are, unless a contrary intention appears, to be read as references to the Sovereign for the time being (a). Consequently, the statutory rights and obligations of the Crown do not cease upon its demise. The expression "the Crown," even in a British statute, is not confined to the prerogative of the Crown in England. In *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick* (b), it was held that the British North America Act, 1867, did not sever the connection between the Crown and the Provinces of Canada, nor take away the prerogative of the Crown as to the priority of Crown debts due to the provincial government, nor reduce the provinces to the rank of municipal institutions (c), and in *New South Wales Taxation Commissioners*

(a) Interpretation Act, 1889, s. 30, *post*, Appendix B. The enactment is by the same section expressly made binding on the Crown. The earlier statutes do not seem to have been regarded as binding the successors of the Sovereign in whose reign they were passed, and appointments made by a sovereign determined on his death. See the Act of Settlement, 1700, s. 3. By the Demise of the Crown Act, 1901, the holding of an office under the Crown, within or without the King's dominions, is not affected by the demise of the Crown, nor is any fresh appointment thereby rendered necessary.

(b) [1892] A. C. 437.

(c) In some provinces, e.g., Quebec, the Crown right is limited. See *Exchange Bank of Canada v. R.* (1886), 11 App. Cas. 157, holding that the Crown is bound by the two codes of lower Canada. See also as to provincial right to escheats as against the Dominion, *Att.-Gen. for Ontario v. Mercer* (1883), 8 App. Cas. 767.

v. *Palmer* (*d*), it was held that the New South Wales Bankruptcy Act, 1898, did not deprive the Crown of its right to preferential payment before all other creditors (*e*).

A Governor of a colony is not a general representative of the Sovereign and can only exercise such part of the prerogative as is delegated to him by his commission or by statute. The delegation may be tacit, as the prerogative right of incorporation of companies by charter (*f*); or the right to appoint King's counsel (*g*). There is only one Crown and the Crown is not to be regarded as several juristic persons, but may act for different purposes through different channels (*h*). The Crown in a Province or State may be bound by the legislation of the Dominion or the Commonwealth, or *vice versa*. The Dominion of Canada can raise customs duties on a Province's wine imports (*i*), so in the Commonwealth of Australia a Commonwealth customs duty binds a State Government (*k*). The Crown in the Commonwealth can sue the Crown in a State in contract or in tort or *vice versa* (*l*). A State may sue another State as to its boundary line (*m*).

Statutes made for benefit of Crown.

2. In *Reniger v. Fogossa* (*n*), it is said that "a statute made for the benefit of the King shall be construed most beneficially for him." The reason of this rule is explained by Plowden as being that all statutes are made by the King's subjects, and that, if a statute is made for the benefit of the King, the makers, that is, the King's subjects, are in the position of grantors or donors, and the King is in the position of a grantee or donee. Now, the general common law rule with regard to grants or gifts is that they shall be construed most strongly against the grantors and most beneficially for the grantee; "and if," continues Plowden, "it be so where a common person is grantee or donee, *a multo fortiori* where the King is grantee, therefore a statute whereby anything is given to the King must be construed most beneficially for the King." This rule, though cited in Comyns' Digest (tit. Parliament, R. 21) as well recognised with regard to the effect of statutes,

(*d*) [1907] A. C. 179.

(*e*) Cf. *Att.-Gen. for N. S. W. v. Curator of Intestate Estates*, [1907] A. C. 519, 523.

(*f*) *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A. C. 566.

(*g*) *Att.-Gen. for Dominion of Canada v. Att.-Gen. for Ontario*, [1898] A. C. 247.

(*h*) *Commonwealth v. Colonial Combining, etc., Co.* (1922), 31 Australian C. L. R. 421, 439; *Engineers' Case* (1920), 28 Australian C. L. R. 152; *Re Silver Bros.*, [1932] A. C. 514. See also *Att.-Gen. v. G. S. W. Ry. of Ireland*, [1925] A. C. 754.

(*i*) *Att.-Gen. for British Columbia v. Att.-Gen. of Canada*, [1924] A. C. 222.

(*k*) *R. v. Sutton* (1908), 5 Australian C. L. R. 789; *Minister of Works (W. A.) v. Gulson* (1944), 69 Australian C. L. R. 338, 365.

(*l*) *Commonwealth v. New South Wales* (1923), 32 Australian C. L. R. 200, 205, 209.

(*m*) *South Australia v. Victoria* (1911), 12 Australian C. L. R. 667, affd., [1914] A. C. 283. In this case O'Connor, J., said, at p. 711: "If the British Government . . . were to enter into possession of a portion of the South Australian public lands . . . His Majesty's Minister would be liable to be dispossessed by writ of intrusion."

(*n*) (1549), Plowd. 1, 10.

has rarely been adopted in reported cases (o). In *R. v. Treasury* (p), a question arose with regard to the construction of 1 & 2 Will. 4, c. 11, by which an annuity was granted to Queen Adelaide. After disposing of various other arguments, the Court said: "Finally, reliance is placed on the exalted rank of Her Majesty. We are at a loss to know how this should influence the construction of the language by which provision is made for her; we might as well be told of her exemplary virtues while living, and of her saint-like death, which will ever make her memory cherished with affection and reverence by the English nation; these we are most ready to acknowledge, but we sit here merely as Judges to interpret an Act of Parliament." But this opinion is no denial of the existence of the rule, inasmuch as a Queen Consort is clearly not entitled to the constitutional prerogatives of the Crown (q).

Crown not bound by statute unless specially named, or clearly intended.

3. The history of legislation is to a large extent a history of the restriction of the royal prerogative (r), but "it is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there are words to that effect; for it is inferred *prima facie* that the law made by the Crown, with the assent of the Lords and Commons, is made for subjects, and not for the Crown" (s). "This general rule, as expressed in Bacon's Abridgment (t), is that, 'where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him'" (u). In the colonies the executive government represents the Crown as it does in England (x).

(o) See *Bishop of Meath v. Lord Winchester* (1835), 4 Cl. & F. 445, at p. 484, where the rule as laid down in Comyns' Digest was prayed in aid by Sir F. Pollock *arguendo*; and the *Bloomfield Peerage Claim* (1831), 2 Dow. & Cl. 344, 346, where the Lord Chancellor (Brougham) said: "All grants to which the Crown was a party are to be construed in favour of the Crown." In the old grants of patents it was usual to insert a provision that they should be construed in favour of the patentee.

(p) (1851), 20 L. J. Q. B. 305, 312, Lord Campbell, C.J.

(q) Queen Natalie of Serbia was denied in Germany the immunities of a Sovereign, as she was only a Queen Consort.

(r) Older statutes contain express savings of the prerogative. See Chitty, Prerogative, 383.

(s) *Att.-Gen. v. Donaldson* (1842), 10 M. & W. 117, 123, Alderson, B.; and see *Willion v. Berkley* (1562), Plowd. 223, at p. 240; *Théberge v. Laundry* (1876), 2 App. Cas. 102; *Cushing v. Dupuy* (1880), 5 App. Cas. 410, 419.

(t) 7th ed., p. 462.

(u) See *Ex p. Postmaster-General* (1879), 10 Ch. D. 595, 601, Jessel, M.R.; *Wheaton v. Maple*, [1893] 3 Ch. 48, 64, Lindley, L.J. The Arbitration Act, 1950 (14 Geo. 6, c. 27) s. 30, enacts that the Crown shall be bound by Part I of the Act.

(x) *Roberts v. Ahern* (1904), 1 Australian C. L. R. 406. Acting upon this rule, the High Court of Australia decided that s. 5 of the Police Offences Act, 1890 (Victoria), did not affect the Government of that State, and did not affect the Commonwealth Government or its agencies in the management of departments transferred from the State to the Commonwealth. This meant in the particular case that a contractor for carting night soil from a Commonwealth post office was exempt from control by the local sanitary authority; *Essendon Corporation v. Criterion Theatres, Ltd.* (1947), 74 Australian C. L. R. 1, 28; but cf. *Pirrie v. McFarlane* (1925), 36 Australian C. L. R. 170.

The Land Transfer Act, 1897, did not bind the Crown and therefore the legal estate in escheated land did not under section 1 of that Act vest in the Solicitor to the Treasury as the Crown's nominee (y). Likewise the Courts (Emergency Powers) Act, 1943, did not bind the Crown and therefore the Court could enforce a judgment for a Crown debt (arrears of income tax) without leave of the appropriate Court (z). Nor does the Debtors Act, 1869, and therefore a debtor can be arrested for a Crown debt (a).

The Rent Restrictions Acts, 1920–23, do not bind the Crown, and the immunity continues during the currency of a tenancy created by the Crown even after sale during that tenancy by the Crown, but does not run with the land in favour of a purchaser, who creates a new tenancy (b). But it has been more recently held that the property of the British Transport Commission is not Crown property although it is controlled by the Minister of Transport and that property is subject to the Rent Restriction Acts. "In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an 'emanation of the Crown' but whether it is properly to be regarded as the servant or agent of the Crown. When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947. In the absence (as here) of any such express provision, the proper inference, in the case at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department" (c).

Upon the same principle it has been held that section 8 of the Maritime Conventions Act, 1911 (which provides that actions in respect of damage to ships must be instituted within two years of the date of the damage), does not bind the Crown and so does not limit the time within which actions for damages to His Majesty's ships must be instituted (d).

The rule is analogous, if not equivalent, to the rule already stated (e), that the common law is not presumed to be altered by statute, for the rights and titles and prerogatives of the Crown are in reality part of the common law of England. The reason of the rule is thus put by Plowden 240: "Because it is not an Act without the King's assent,

(y) *Re Hartley*, [1899] P. 40.

(z) *Att.-Gen. v. Hancock*, [1940] 1 K. B. 427, decided under the Courts (Emergency Powers) Act of 1939; see p. 401, *infra*.

(a) *Att.-Gen. v. Randall*, [1944] 1 K. B. 709, affirming *Att.-Gen. v. Edmunds* (1870), 22 L. T. 667.

(b) *Wirral Estates, Ltd. v. Shaw*, [1932] 2 K. B. 247, approving *Clark v. Downes* (1931), 145 L. T. 20; *Wheeler v. Wirral Estates Ltd.*, [1935] 1 K. B. 294; followed in *Rudler v. Franks* (1947), 63 T. L. R. 109; *Territorial Forces Assocn. v. Philpot* (1947), 63 T. L. R. 471; *London County Territorial and Auxiliary Forces Assocn. v. Nichols*, [1949] 1 K. B. 35. Cf. Rating and Valuation Act, 1925, s. 64 (3).

(c) *Tamlin v. Hannaford* (1949), 65 T. L. R. 422, 423, Denning, L.J., applying *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744, and distinguishing *County of London Territorial Forces Assocn. v. Nichols*, *supra*.

(d) *The Loredano*, [1922] P. 209.

(e) See p. 310, *ante*.

and it is to be intended that when the King gives his assent he does not mean to prejudice himself or to bar himself of his liberty and his privilege, but he assents that it shall be a law among his subjects." One particular application of this rule is to be found in decisions that high officers of the Crown, acting under the statutes relating to the post office and telegraphs, may not be sued for negligence in the exercise of powers given by such Acts.

In *Hornsey U. D. C. v. Hennell* (f), it was held that the Crown, not being named in section 150 of the Public Health Act, 1875, was not liable to pay paving expenses incurred in respect to a street on which abuts property in the occupation of the Crown (g). In *Cooper v. Hawkins* (h), the Locomotives Act, 1865, was held not to apply to a locomotive driven by a servant of the Crown on Crown service, because the Crown was not expressly named (i).

The Crown is bound if named by necessary implication. It is not necessary, however, that the Crown be expressly named. The Crown is bound by a statute in which it is named by necessary implication, though not expressly. Thus in *Stewart v. Thames Conservancy* (k) it appeared that by the Thames Conservancy Act, 1894, certain properties were exempted "from all parliamentary rates, taxes, and payments whatsoever," and it was held that those properties were exempt from payment of income tax to the Crown, as it was clear from the provisions of the statute that it was intended that the Crown should be bound. Recently the Judicial Committee has held that the Crown is not bound either expressly or by necessary implication by section 222 (l) and section 265 of the City of Bombay Municipal Act, 1888, giving the Municipality power to carry water mains across or under any street and through or under any land whatsoever within the city (l).

Rule formerly applied to agents of the Crown. Formerly agents of the Crown shared this exemption and in *Commissioners of His Majesty's Works v. Pontypridd Masonic Hall Co., Ltd.* (m), it was held that notwithstanding that the Commissioners of Works were an incorporated body, when acting as mere agents of the Crown they were

(f) [1902] 2 K. B. 73, 80.

(g) In this case many of the prior authorities are collected; and doubt is thrown on *Westminster Vestry v. Hoskins*, [1899] 2 Q. B. 474, with respect to the enforcement of Health Acts on Crown premises. See s. 12 of the Public Health Amendment Act, 1907.

(h) [1904] 2 K. B. 164.

(i) The Act was declared applicable to servants of the Crown by the Motor Car Act, 1903, s. 16. As to prisons, see *Gorton L. B. v. Prison Commissioners* (1887), reported, [1904] 2 K. B. 165 n.

(k) [1908] 1 K. B. 893.

(l) *Bombay Province v. Bombay Municipal Corpn.*, [1947] A. C. 58, where the views expressed in the Scottish cases of *Somerville v. Lord Advocate* (1893), 20 Rettie 1050, and *Magistrates of Edinburgh v. Lord Advocate*, [1912] S. C. 1085, 1090, 1091, were not adopted as not being in accordance with English law.

(m) [1920] 2 K. B. 233. Cf. *R. v. Sutton* (1908), 5 Australian C. L. R. 789, 796, Griffith, C.J.

not bound by the Statute of Limitations inasmuch as that statute did not at that time bind the Crown (n).

Effect of Crown Proceedings Act, 1947. Since the passing of the Crown Proceedings Act, 1947, many of the older authorities on the question as to whether or not the Crown is bound have ceased to apply. This Act puts the Crown as far as possible, so far as tort is concerned, in the same position as a private person. Thus the Crown will generally be liable in tort for the acts and defaults of its servants and agents for breaches of those duties which a person owes at common law to his servants or agents, for breaches of duties attaching at common law to the occupation or control of property and for breaches of statutory duty which, if committed by a subject would give rise to liability in tort (s. 2 (1) (2)). Exceptions are made in the case of defence, the armed forces of the Crown and the postal service, and no proceedings will lie against the Crown or its servants or agents for anything done or omitted in relation to postal packets or telephonic communication. Section 11 contains a general saving for acts or omissions of the Crown in the proper exercise of prerogative and statutory powers. It may be added that petitions of right and Latin and English informations and some other ancient forms of proceedings against the Crown are abolished, and as far as possible procedure by or against the Crown will be governed by the ordinary rules of Court. Any remedy except injunction, specific performance or an order for specific restitution of property may be granted against the Crown (s. 21).

Sovereign in private capacity not within the rule. To say that the rights of the Crown are not barred by any statute which does not name them, does *not* mean that the King, looked upon as a mere individual, may not be in certain cases deprived by statutes which do not specially name him, "of such inferior rights as belong indifferently to the King or to a subject, such as the title to an advowson or a landed estate"; what it does mean is that the King cannot in any case whatever be stripped by a statute, which does not specially name him, "of any part of his ancient prerogative, or of those rights which are incommunicable and are appropriated to him as essential to his regal capacity" (o). In the *Magdalen College Case* (p), Coke says that it was resolved "that where the King has any prerogative, estate, right, title or interest by the general words of an Act he shall not be barred of them." The question there raised was whether the King, not being specially named in 13 Eliz. c. 10, was bound by it. By that statute it was enacted that "all leases, grants, or conveyances to be made by any master and fellows of any college . . . of any houses,

(n) *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781; *Roper v. Public Works Commissioners*, [1915] 1 K. B. 45. See also *Austrian Property (Administrator) v. Russian Bank for Foreign Trade* (1931), 48 T. L. R. 37; *Hungarian Property (Administrator) v. Finegold* (1931), 100 L. J. K. B. 383, see p. 395, *post*.

(o) See Dr. Woodeson's *Vinerian Lectures*, vol. i, p. 31.

(p) (1616), 11 Co. Rep. 68 b.

lands . . . to any person or persons, bodies politic or corporate, for a longer term than twenty-one years, shall be utterly void," and it was contended by the plaintiff that this statute did not extend to the King so as to make void a lease made to Queen Elizabeth by Magdalen College for a longer term than twenty-one years. In support of his argument the plaintiff prayed in aid various cases in which it had been held that the King was not bound by statutes unless named in them. Thus, by the Statute of Westminster the Second (13 Edw. 1, c. 36), which settles reasonable aid (as well to make the eldest son knight as to marry the eldest daughter) in certain (*sic*), it was enacted that from henceforth of a whole knight's fee there should be given only 20s. and of £20 land held in socage 20s., and of more, more, and of less, less; but it was held, that forasmuch as the King was not named, he was not bound by the law, and to settle that in certainty was passed the 25 Edw. 3 (stat. 5), c. 11, in which Act the King was specially named.

Limitation Acts. Also the King hath a prerogative *quod nullum tempus occurrit regi*, and therefore the general Acts of limitations or of plenarty shall not extend to him (*q*). Lord Coke also says: "Many other cases were cited upon this large and common ground which you may find in our books, and especially in Plowden's Comm., *Willion v. Berkley* (1560), at p. 240." The cases cited by Plowden bear out the proposition above stated, namely, that where the King has any "prerogatives, estate, right, title, or interest, which are incommunicable and appropriated to him as essential to his regal capacity," he shall not be barred to them by the general words of an Act of Parliament (*q*).

Formerly therefore the Crown was unaffected by any Statute of Limitations and as we saw (p. 393, *ante*) a body whether incorporated or not, acting as agents of the Crown was equally exempt. Now by section 30 of the Limitation Act, 1939, the statute is to apply to proceedings by or against the Crown in the same manner as to proceedings against subjects. The only exceptions are, (i) proceedings as to taxes, duties and customs and, (ii) arbitrations to which the Crown is party and for which if it were between subjects a period of limitation would be prescribed by any other enactment (section 32). Limitation on the Crown for the recovery of land is thirty years or sixty years for the recovery of foreshore (section 4 (1)).

Prescription Acts. In *Perry v. Eames* (*r*), the rule was thus stated by Chitty, J., as to the Prescription Act, 1832: "The plaintiffs claim the access of light under the 3rd section of 2 & 3 Wm. 4, c. 71, the Act for shortening the time of prescription in certain cases. . . . The Crown is not named in that section, but is named in the 1st and 2nd

(*q*) See *Att.-Gen. v. Emerson*, [1891] A. C. 649, in which the Crown claimed part of the Maplin Sands, which had been in the possession of subjects for at least five centuries.

(*r*) [1891] 1 Ch. 657, 665, 668, 669. The site in question had been Crown property from 1820 to 1886.

sections. Therefore, regard being had to the general rule that the Crown is not bound by a statute unless named, a very strong case arises for holding that the Crown is not bound by the 3rd section. It was, however, argued for the plaintiffs that the Crown is bound by necessary implication, because the servient tenement is not mentioned in the 3rd section But it appears to me a wholly immaterial circumstance whether the servient tenement is mentioned or not. It is not a circumstance from which any intention on the part of the Crown can be inferred, much less is it sufficient to raise a necessary implication, or to support an irresistible inference of intention to bind the Crown.”

Equitable rights of the Crown as affected by statutes. In *Perry v. Eames, supra*, Chitty, J., proceeded to lay down a further rule of great importance in modern times, where the functions of the Crown are put into commission: “It was contended that although the section [s. 3 of the Prescription Act, 1832] might not apply where the legal estate was vested in the Crown, it does apply where the legal estate is held by subjects in trust for the Crown (s). In support of this contention various authorities were cited for the plaintiffs but none of them really touched the point. One of them was *Sharp v. St. Sauveur* (r). All that was there decided was that the Crown could enforce in the Court of Chancery a trust of land created for an alien prior to the Naturalisation Act, 1870. That has no bearing on the case before me. In ancient times it was not the practice to vest the legal estates in trustees for the Crown, and thus there is little or no direct ancient authority on the point. The second resolution in the *Magdalen College Case* (u) appears, however, to be large enough to cover it. It was resolved that where the King has any prerogative right, title, or interest, he shall not be barred of them by the general words of an Act of Parliament. There is no reason for confining this resolution to mere legal interests, or for excluding an absolute beneficial ownership in the Crown.” And after referring to *R. v. McCann* (x) as placing a trustee for the Crown in the same position as a servant of the Crown, Chitty, J., added: “Now, in the cases before me, the Crown’s absolute beneficial ownership for the purposes of the Act is expressly manifested by a public statute, and it is obvious that the legal estate was vested in trustees merely for the purposes of more convenient administration by a department of the Queen’s Government. I am of opinion, then, that the prerogative of the Crown takes these cases out of the operation of the 3rd section.” In *Jones v. Mersey Docks and Harbour Board* (y), a case as to liability of the Mersey Docks to be rated to the poor under the Poor Relief Act, 1601, Lord Cranworth stated the law as to

(s) Approved, *Wheaton v. Maple*, [1893] 3 Ch. 48, 64, 65, Lindley, L.J.

(r) (1872), L. R. 7 Ch. App. 343.

(u) (1616), 11 Co. Rep. 74 b.

(x) (1868), L. R. 3 Q. B. 141, affd. *ibid.* p. 677, following *Jones v. Mersey Docks & Harbour Board, infra*.

(y) (1864), 11 H. L. C. 443, 508.

the exemption of the Crown in the following passage. "The Crown, not being named, is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates, not only royal palaces, but also the offices of the Secretaries of State, the Horse Guards, the Post Office, and many similar buildings. On the same ground police-courts, county courts, and even county buildings occupied as lodgings at the assizes have been held exempt. These decisions, however, have all gone on ground more or less sound, that these might all be treated as buildings occupied by servants of the Crown (z), and for the Crown, extending in some instances the shield of the Crown to what might more fully be described as 'the public government of the country.'"

Prerogatives affected by statutes.

4. *Penalties or forfeitures.* An Act creating a forfeiture does not bind the Crown (a). Thus, in *R. v. Kent Justices* (b), it was decided that the Weights and Measures Act, 1878, did not apply to Post Office weights, as to hold so would involve a forfeiture of Crown property. All statutory fines and forfeitures belong to the Crown unless otherwise provided by the Act creating them. Where a penalty is created by statute, and nothing is said as to who may recover it, and the offence is not against an individual, it belongs to the Crown, and consequently a common informer cannot sue on a penal statute unless an interest in the penalty is given to him by express words or necessary implication (c).

Duties and taxes. The Crown receives and does not pay duties and taxes (d). But in section 119 of the Stamp Act, 1891, provision is made for the imposition of stamp duty on instruments relating to property belonging to the Crown or being the private property of the Sovereign in the same manner as on property of subjects, unless a contrary intention is expressed. The effect of this provision is to alter the common law presumption as to the exemption of the Crown from the provisions of a statute so far as relates to stamp duties on instruments.

(z) *Coomber v. Berks Justices* (1883), 9 App. Cas. 61.

(a) See *Cooper v. Hawkins*, [1904] 2 K. B. 164.

(b) (1889), 24 Q. B. D. 181.

(c) *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354. As to Penal Acts, see Part III, *infra*.

(d) In British Dominions having a federal constitution special considerations affect the liability of the Governments of the constituent States or Provinces to taxation imposed by the federal legislature: *R. v. Sutton* (1908), 5 Australian C. L. R. 789; *Att.-Gen. for N. S. W. v. Collector of Customs for N. S. W.*, *ib.*, p. 818; [1909] A. C. 345; cf. *Minister of Works (W. A.) v. Gulson* (1944), 69 Australian C. L. R. 338, 348, 351; *Essendon Corporation v. Criterion Theatres, Ltd.*, (1947), 74 Australian C. L. R. 1, 28; *Att.-Gen. for British Columbia v. Att.-Gen. of Canada*, [1924] A. C. 222.

Tolls. In *R. v. Cook* (e) the question arose whether 25 Geo. 3, c. 51, s. 4, which enacted that there should be charged a duty of 1½d. per mile upon every horse hired to travel post, made this duty payable by a person carrying despatches for the Government. Lord Kenyon, in deciding that this Act did not bind the King, said: "Generally speaking, in the construction of Acts of Parliament the King in his royal character is not included unless there be words to that effect. . . . Although there is no special exemption of the King in this Act, yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43rd Eliz. and every other Act imposing a duty or tax upon the subjects." So in a number of cases it has been held that Acts imposing tolls upon all persons using bridges or highways do not bind the Crown and that there is an implied exemption in favour of the Crown and its private and public servants (f). In *Att.-Gen. v. Cornwall County Council* (g) a claim was made against the Crown for ferry tolls alleged to be due under the provisions of a private Act of 1790. Under the Act the running of other ferries in competition was forbidden, but officers and other servants of the Crown were expressly exempted from this provision. The owners of the ferry were exempted from taxation in respect of it. It was held that the prerogative right of freedom from tolls still existed, as the Crown could not be said to have abandoned that right by accepting the express exemption as to competitive ferries or by abandoning the right to tax the ferry. In *Att.-Gen. v. Wilts United Dairies Ltd.* (h), the Food Controller had imposed a penalty of 2d. per gallon on milk sold by the respondents outside a certain area. The levy was held to be illegal by the House of Lords as a violation of the Bill of Rights inasmuch as it was a form of taxation unauthorised by Parliament. The effect of this decision was offset by giving the Treasury power to impose and recover charges in connection with any scheme of control authorised by the Regulations (Emergency Powers (Defence) Act, 1939, s. 2).

Harbour dues. In *Smithett v. Blythe* (i), on a claim for lighthouse dues against the Crown, it was held that the claim was not maintainable as to post packet ships owned by the Crown, although the express exemption was as to ships of war only. It was said that the express exemption raised no implication that the general right to take charges granted by the Act extended to other vessels owned by the Crown (k).

(e) (1789), 3 T. R. 519, 521.

(f) *Westover v. Perkins* (1859), 2 E. & E. 57; *Att.-Gen. v. Londonderry Bridge Commissioners*, [1903] 1 Ir. R. 389; *Cooper v. Hawkins*, [1904] 2 K. B. 164; cf. Public Health Act, 1925, s. 7, and Schedule IV.

(g) (1933), 97 J. P. 281; 31 L. G. R. 364.

(h) (1922), 38 T. L. R. 781.

(i) (1830), 1 B. & Ad. 509.

(k) *Trinity House v. Clarke* (1815), 4 M. & S. 288. In India some controversy has arisen on the question whether a local legislature can affect the prerogative of the Crown: *Bell v. Madras City Commissioners* (1901), Ind. L. R. 25 Madras 457, 482 *et seq.*

In *Mayor of Weymouth v. Nugent* (l) the question was whether stone brought into the harbour of Weymouth for use of Government works was exempt from wharfage duty chargeable by a private Act upon all goods brought into the harbour. It was contended that the Crown, not having been expressly exempted, was liable to pay this wharfage. But it was held that, as immunity from all tolls of any kind is a prerogative right of the Crown, if the Crown was to be held liable by implication to pay wharfage duty a prerogative of the Crown would be directly affected, and the well-established rule that the Crown was not bound by an Act of Parliament, unless named in the Act, would be broken (m).

Rates. It is also a prerogative right of the Crown not to pay rates, and it has always been held that the Crown, not being named in the Poor Relief Act, 1601, is not liable to be rated for the relief of the poor. The decisions on this subject have greatly extended the meaning of the expression "in the occupation of the Crown." At the present time, not only is all property in the occupation of the Crown not rateable, but also where property is occupied for the Crown it is not to be rated (n). Lord Blackburn, in *Coomber v. Berks Justices* (o), thus stated the general rule: "It seems to me that it is not material whether the assessment statute imposing any tax does so, like the Poor Rate Acts, for a local purpose, or like the statute imposing a duty on posthorses, considered in *R. v. Cook* (p), or the income-tax for an imperial purpose. In each there is an implied exemption on the ground of prerogative. And if the property is so held as to bring it within the ground of exemption from the one statute, it must surely be brought within the ground of exemption from the other." And Lord Watson said: "The existence of the same kind and degree of interest on the part of the Crown which is deemed in law sufficient to protect an occupier from liability to the poor-rate must also be held sufficient to shield the owner of the bare legal estate against any demand for payment of income-tax. The judgment of a Court of law to the effect that certain public purposes are such as are required and created by the Government of the country, and must therefore be deemed part of the use and service of the Crown, is a decision resting upon grounds altogether outside and independent of the provisions of the Act of Elizabeth, and, so far as I know, of any other taxing Act to be found in the Statute-book. I therefore think that the cases in which it has been decided that the actual occupiers of assize courts and police stations are exempt from poor-rate as being within the privilege of the Crown are decisions of an equal authority in a question as to exemption from income-tax" (q).

(l) (1865), 6 B. & S. 22, 34, Cockburn, C.J., on origin of exemption of Crown from tolls.

(m) See also *Northam Bridge Co. v. R.* (1886), 55 L. T. 759.

(n) See Ryde on Rating (8th ed.), pp. 127—149 and 180 L. T. J. 189.

(o) (1883), 9 App. Cas. 61, at p. 71.

(p) (1789), 3 T. R. 519; see p. 398, *ante*.

(q) *Loc. cit.* p. 77; Lord Bramwell agreed, p. 79.

What is Crown Property. The question then arises, What property falls within this conceded exemption? The rule laid down in *R. v. Cook* (r) as to tolls has been held also to apply to local rates, but controversy has raged round the question, What is Crown property within the rule? The leading case on this subject is *Jones v. Mersey Docks and Harbour Board* (s), where Lord Westbury laid it down that public purposes to make an exemption "must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown" (t). The rule is also laid down by Lord Cairns in substantially the same terms in *Greig v. University of Edinburgh* (u): "The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in or for the service of the Crown, is not rateable to the relief of the poor." Buildings occupied for volunteer corps have been held to be used solely for the military service of the Crown, and to be exempt from rates (x) and from contribution to the expense of paving streets upon which they abut (y); and from Building Acts (z). And houses acquired by a county association under the Territorial and Reserve Forces Act, 1907, for use, and in fact used, as residences for non-commissioned officers of the Regular Army as instructors of the Territorial Forces are exempt from rates on the ground that they are occupied by servants of the Crown for the purposes of the Crown (a).

A statute which for the public benefit grants the Crown priority in respect of "all assessed taxes" should be construed as referring to all assessed taxes, present and future (b).

Costs. It was a prerogative right of the Crown not to pay costs in any judicial proceeding; and it was held in *R. v. Beadle* (c) that there was no power to award costs against the Crown except in those cases in which it was expressly authorised by Act of Parliament (d). "I do

(r) *Supra*.

(s) (1865), 11 H. L. C. 443.

(t) At p. 505. See also *Perry v. Eames*, [1891] 1 Ch. 658, 668, followed in *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48 (C. A.) and xxviii L. Q. R. 378.

(u) (1868), L. R. 1 H. L. (Sc.) 348, 350.

(x) *Pearson v. Holborn Union Assessment Committee*, [1893] 1 Q. B. 389. See also *Derby Terr. Army Ass. v. Derby Assessment Committee*, [1935] 2 K. B. 373.

(y) *Hornsey U. D. C. v. Hennell*, [1902] 2 K. B. 73, which doubts the case of *Westminster Vestry v. Hoskins*, [1899] 2 Q. B. 474 (drill hall vested in commanding officer of corps not exempt from sanitary provisions in Metropolis Management Act, 1855); cf. *Lord Advocate v. Lang* (1866), 5 Rettie 84; *Lord Colchester v. Kewney* (1867), 36 L. J. Ex. 172.

(z) *Jay v. Hammon* (1857), 27 L. J. M. C. 25.

(a) *Wixon v. Thomas* (No. 2), [1912] 1 K. B. 690.

(b) *Re Winget, Ltd., Burn v. The Co.*, [1924] 1 Ch. 550.

(c) (1857), 26 L. J. M. C. 111, 115.

(d) 20 & 21 Vict. c. 43, ss. 4, 6; *Moore v. Smith* (1859), 28 L. J. M. C. 126, and 19 & 20 Vict. c. 56, s. 24; *Alexander v. Officers of State for Scotland* (1868), L. R. 1 H. L. (Sc.) 276; *R. v. Archbishop of Canterbury*, [1902] 2 K. B. 503, 571; *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517; *Rowland and Kennedy v. Air Council* (1925), 41 T. L. R. 545.

not believe," said Lord Campbell, C.J., in giving judgment, "that it was the intention of the framers of that Act to embrace cases of this sort, but it is enough for us to say that the Crown is not expressly mentioned in this Act, and cannot therefore be bound." This does not affect the right of the Crown to receive costs (e). The words of section 6 of the Statute Law Revision Act, 1881, are *prima facie* wide enough to include power to make provision by Rules of Court for costs in "proceedings by or against the Crown" (f), and in revenue proceedings the Crown, if unsuccessful, now pays costs (g). Under the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, power is given to a Court or arbitrator to direct payment of costs to or by the Crown under the circumstances laid down in the Act. Now by the Crown Proceedings Act, 1947, s. 17, the Judgments Act, 1838, enacting that a judgment debt is to carry interest, applies to debts due to and from the Crown, and where costs are awarded to or against the Crown interest shall be paid thereon and section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, giving power to award interest on a debt or damages, applies to a judgment given for or against the Crown. By section 21 Courts have the power to make all orders against the Crown as against subjects. Formerly the common law rule was that the Crown neither paid nor received costs (h).

Crown debts. Debts due to the Crown or to its agents formerly took priority over debts due to subjects, even in bankruptcy, unless there was express statutory provision to the contrary (i). In *R. v. Wells* (k), Macdonald, C.B., said: "I take it to be an incontrovertible rule of law that where the King's and the subject's title concur, the King's shall be preferred" (l). This rule applied if the debt was due to the Crown in respect of a Colonial Government (m). And in *Re Oriental Bank*

(e) *Moore v. Smith* (1859), 1 E. & E. 597. But see *R. v. Archbishop of Canterbury*, *supra*.

(f) *R. v. Archbishop of Canterbury*, *supra* at p. 573, Wright, J.; and see Short and Mellor, Cro. O. Pro. (2nd ed.) 389; but cf. *Re Mills Estate* (1886), 34 Ch. D. 24. (Judicature Act and R. S. C., O. lxx, r. 1, do not give the Court any new jurisdiction as regards costs.)

(g) *Edinburgh Life Assurance Co. v. Lord Advocate*, [1910] A. C. 143. Cf. *Att.-Gen. v. Till*, [1910] A. C. 50 and 22 & 23 Vict. c. 21, s. 21. As to costs in the case of an application made under s. 8 of the Patents and Designs Act, 1919, upon the abandonment of the application, see *Re Carbonit Aktiengesellschaft and Schmidt*, [1924] 2 Ch. 53.

(h) Cf. e.g., *Re Carbonit Aktiengesellschaft*, *supra*.

(i) *Ex p. Postmaster-General* (1879), 10 Ch. D. 595. And see *Laycock v. Special Commissioners of Income Tax*, [1919] 1 Ch. 241, as to s. 33 of the Bankruptcy Act, 1914. In *Land Commissioners v. O'Neill*, [1915] 2 Ir. R. 66, a purchase annuity payable to the Irish Land Commission under the Irish Land Act, 1903, was held to be a Crown debt. As to the priority of the Crown over an executor's right of retainer under the Administration of Estates Act, 1925, in the case of an insolvent estate, see *Att.-Gen. v. Jackson*, [1932] A. C. 365.

(k) (1807), 16 East 278, note; 282.

(l) See *Quick's Case* (1611), 9 Co. Rep. 129 b; *Henley's Case* (1878), 9 Ch. D. 469, 481.

(m) *Re Oriental Bank Corporation* (1884), 28 Ch. D. 634; *Liquidator of Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A. C. 437.

Corporation (n) it was decided that, although section 150 of the Bankruptcy Act, 1883, took away the priority of the Crown over other creditors in the distribution of assets, and section 10 of the Judicature Act, 1875, had directed the assimilation of liquidation and bankruptcy procedure and the respective rights of secured and unsecured creditors, yet the Crown retained, under the Companies Acts then in force, its prerogative right to be paid Crown debts in full in priority to other creditors of a company (*o*). By section 151 of the Bankruptcy Act, 1914, it is provided that "save as provided in this Act, the provisions of this Act relating to remedies against the property of a debtor, the priority of debts, the effect of a composition or scheme of arrangement and the effect of a discharge shall bind the Crown." The Crown has thus lost its old priority in, *e.g.*, the administration of estates save as to one year's assessed taxes (*oo*). And it has been held that the provisions of the Companies (Consolidation) Act, 1908, have taken away the Crown's prerogative right to preferential payment in winding up a company and the prerogative remedies for enforcing the right (*p*). And the statutory provision in the Companies Act, 1929, section 264, gives priority to the debts therein mentioned over all other debts, including debts due to the Crown. No change is made in the Companies Act, 1948.

Entails. In *Re Cuckfield Burial Board (q)* the question raised was whether section 7 of the Lands Clauses Consolidation Act, 1845, bound the Crown. That section enables persons having a limited interest in land as tenants for life or in tail to sell and convey lands for public purposes. In this case certain lands, which were required for a burial-ground, had been by a private Act settled upon the ancestor of the tenant in tail, with an express enactment that the entail was not to be barred, and with an ultimate reservation to the Crown upon failure of issue male. It was objected on behalf of the Crown that this section of the Act of 1845 did not enable the tenant in tail to convey away this ultimate reversion of the Crown. Romilly, M.R., in giving judgment, said: "The Act (8 & 9 Vict. c. 18) is very general in the wording; it certainly includes Lord Abergavenny (the present tenant in tail), as well as any other person and, notwithstanding the statutory disability to bar the entail, he has not only power to sell, but to convey and bar his heirs in tail and all remaindermen except the Crown, which cannot be bound by any Act without being named. Lord

(*n*) *Supra*.

(*o*) See *Re Galvin*, [1897] 1 Ir. R. 520.

(*oo*) As to the meaning of s. 33 (1) (a) of the Bankruptcy Act, 1914, see *Re Pratt*, [1950] 2 A. E. R. 924.

(*p*) *Re H. J. Webb & Co. (Smithfield, London) Ltd.*, [1922] 2 Ch. 369; *affd. sub nom. Food Controller v. Cork*, [1923] A. C. 647. The Act of 1908 was repealed by the Companies Act, 1929, and these provisions re-enacted in s. 247 of that Act. The 1929 Act has been repealed by the Companies Act, 1948, which contains (s. 319) nothing about priority of the Crown.

(*q*) (1855), 24 L. J. Ch. 585, 586. Cf. *Fitzgerald v. Champneys* (1861), 2 Johns & H. 31.

Abergavenny must therefore obtain the consent of the Crown before he can effectually convey."

Letters patent. By the Statute of Monopolies (21 Jas. 1, c. 3), s. 6, the Crown is permitted to grant letters patent to the true and first inventor of a new manufacture, reserving to him the sole right of working and making such new manufacture for fourteen years (r). In *Feather v. R.* (s) it was decided that this statute, and any grant of letters patent made by the Crown by virtue of it, did not bind the Crown, and that the Crown was entitled itself to manufacture the new invention for the use of the nation, notwithstanding the grant of the letters patent; and in *Dixon v. London Small Arms Co.* (t) this decision was affirmed and extended to the case of any person who, as agent for the Crown, manufactured an article as to the manufacture of which letters patent had been granted to some other person. Now by section 29 of the Patents and Designs Act, 1907, a patent has to all intents the like effect against the Crown as it has against a subject, but any government department may use any invention for the services of the Crown on terms agreed, or, in default of agreement, as settled by the Treasury after hearing the parties interested.

Choice of Courts by Crown. "The King by his prerogative may sue in what Court he pleases, and his prerogative is not barred by Magna Charta, though it enacts in the negative, '*quod communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo*,' for he may have a *quare impedit* in the King's Bench" (u). "It being part of the prerogative of the Crown that the Sovereign is entitled to be an actor in any litigation affecting the rights of the Crown, and to determine in the Court of Exchequer any matter in which the Crown is interested," it was held in *Att.-Gen. v. Constable* (x) that, "as there are certainly not any words in the Judicature Acts which limit the right of the Crown in respect of the decision of questions affecting the revenue," the above-mentioned prerogative right was not affected by those Acts (y). Acts taking away the right to *certiorari* do not, as a rule, bind the Crown (z).

Prerogative right of admitting appeals from colonies, etc. The prerogative of the Crown to admit appeals from the dominions and colonies, in general, cannot be limited or abolished by any dominion or colonial legislation (a); but, so far as relates to matters within the

(r) See the Patents and Designs Act, 1907, s. 17. This section was not affected by the Amending Patents and Designs Act, 1919. Cf. now Patents Act, 1949, secs. 19, 21, 22.

(s) (1865), 6 B. & S. 257.

(t) (1876), 1 App. Cas. 632.

(u) *Magdalen College Case* (1616), 11 Co. Rep. 68 b.

(x) (1879), 4 Ex. D. 172, 173, 174 Kelly C. B.

(y) See *Mountjoy v. Wood* (1856), 1 H. & N. 58; *Att.-Gen. v. Barker* (1872), L. R. 7 Ex. 177; *Dixon v. Farrer* (1886), 18 Q. B. D. 43.

(z) See Short and Mellor, Cr. O. Pr. (2nd ed.), 16, 18, 42, 49. Maxwell, 9th ed., 140.

(a) *Cushing v. Dupuy* (1880), 5 App. Cas. 409, 417; *Wi Matua's Will*, [1908] A. C. 448. For exceptions see *infra*.

competence of such a legislature (b), the prerogative may be cut down and the Crown bound by apt words in statutes, or a dominion or colonial statute may be so framed that the Crown's prerogative to grant special leave to appeal may be inapplicable to decisions under that statute. Thus, *Théberge v. Laudry* (c) turned on a Quebec Act, which transferred the decision of controverted elections from the Legislative Assembly of the province to a Court of Justice, and provided that the decision of the Court should be final. The Judicial Committee held that the provision did not, taken by itself, destroy the prerogative of the Crown to admit an appeal; but having regard to the special nature of the subject,—that election disputes did not relate to ordinary civil rights, and that the Act created a new and unknown jurisdiction so as to vest in a Court of justice the peculiar jurisdiction of the Legislative Assembly,—for these reasons came to the conclusion that the Legislature intended to make the decision final and not subject to review under the prerogative. And in *Moses v. Parker* (d) the Judicial Committee came to a like conclusion against the exercise of the prerogative to admit an appeal against the decision of the Supreme Court of Tasmania, referred to it under the special provisions of a Tasmanian Act of 1858 relating to ungranted Crown lands, and held that the form of the statute was such that the functions of the colonial Court under it were not ordinary judicial proceedings, and did not "attract the prerogative of the Crown to grant appeals." But in *Harrington v. Minister of Lands* (e) the Judicial Committee held that an appeal to the Queen in Council was not barred by a statute of New South Wales, which declared that the judgment of the Supreme Court of the colony was to be "conclusive."

By virtue of sections 2 and 3 of the Statute of Westminster, 1931 (f), the rule stated above is not applicable to Canada, South Africa, the Irish Free State or New Zealand (g). Australia and Newfoundland have not yet adopted these sections (h). In *Nadan v. The King* (i), it was held that the Canadian Parliament could not take away in criminal matters the right of appeal to the Privy Council. The judgment was based on two grounds: (1) that the section of the Criminal Code taking away the right of appeal was repugnant to the

(b) See the Commonwealth of Australia Constitution Act, 1900, s. 74, and the South Africa Act, 1909, s. 106, and p. 474, *post*.

(c) (1876), 2 App. Cas. 102.

(d) [1896] A. C. 245. In this case the Court was to deal with land questions on the basis of "equity and good conscience."

(e) [1899] A. C. 408.

(f) See Appendix C, ss. 2 and 3.

(g) Cf. New Zealand Constitution (Amendment) Act, 1947; and The Statute of Westminster Adoption Act (N. Z.), 1947. Ceylon became an independent Dominion on February 4, 1948. See Ceylon Independence Act, 1947.

(h) Statute of Westminster, s. 10. The Irish Free State ceased to be a Dominion or part of the British Commonwealth on 18 April, 1949, on the coming into operation of the Irish Foreign Relations Act, 1947. Newfoundland became a province of the Dominion of Canada on 1 April, 1949.

(i) [1926] A. C. 482.

Privy Council Acts of 1833 and 1844, and was therefore void under the Colonial Laws Validity Act, 1865, and (2) that the section could only be effective if construed as having an extra-territorial operation, whereas according to the law as it stood in 1926 a Dominion statute could not have extra-territorial operation. It is, however, now within the power of the Dominion Parliament to enact that the jurisdiction of its supreme Court shall be ultimate and thus to exclude appeals to His Majesty in Council in every case which can be brought before any Provincial Court in Canada (*k*). In *British Coal Corporation v. The King* (*l*) it was held, distinguishing *Nadan v. The King*, that section 17 of the Canadian Statute, 23 & 24 Geo. 5, c. 53, in identical terms (as that held invalid in *Nadan v. The King* (*supra*)), passed after the Statute of Westminster, 1931, came into force was valid to bar a petition for special leave to appeal to the Judicial Committee in criminal matters. Similarly, it was held in *Moore v. Att.-Gen. for Irish Free State* (*l*) that the Constitution (Amendment No. 22) Act, 1933, of the Oireachtas, which purported to terminate the right of appeal to His Majesty in Council in both civil and criminal matters and to abrogate the prerogative right of appeal was effective to accomplish its object.

Appeals to His Majesty in Council have been abolished by Acts of the Indian and Pakistan Governments, the former from October 10, 1949, and the latter from May 1, 1950 (*m*).

Mines. The prerogative rights of the Crown extend to gold and silver in all lands, and in *Att.-Gen. v. Morgan* (*n*) it was held that the Acts 1 Will. & Mary, c. 30, and 5 & 6 Will. & Mary, c. 6, although they relax the prerogative in favour of the subject, do not diminish the prerogative as to mines worked simply as gold mines, even where the gold is mixed with base metal (*o*).

Crown may avail itself of statute without being named in it.

5. Although the Crown may not be prejudiced by the operation of a statute which does not specially name the Crown, and although, as Alderson, B., put it in *Att.-Gen. v. Donaldson* (*p*), "it is inferred *prima facie* that the law, made by the Crown with the assent of Lords and

(*k*) *Att.-Gen. of Ontario v. Att.-Gen. of Canada* (*Att.-Gen. of Quebec intervening*), [1947] A. C. 127, 150, 153, explaining *Nadan v. The King* (see the text *supra*) and the powers of a Dominion Parliament under the Statute of Westminster.

(*l*) [1935] A. C. 500, 509; but see now note (*h*) *supra*.

(*m*) Abolition of Privy Council Jurisdiction Act, 1949, passed by constituent assembly of India; Pakistan Privy Council (Abolition of Jurisdiction) Act, 1950.

(*n*) [1891] 1 Ch. 432.

(*o*) As to Crown lands and royalties, see *Att.-Gen. for British Columbia v. Att.-Gen. for Canada* (1889), 14 App. Cas. 295; *St. Catherine's Milling Co. v. R.* (1888), 14 App. Cas. 46; *Att.-Gen. for Ontario v. Mercer* (1883), 8 App. Cas. 767; *Att.-Gen. for Saskatchewan v. Att.-Gen. for Canada*, [1932] A. C. 28; *Hudson's Bay Co. v. Att.-Gen. for Canada*, [1929] A. C. 285; *Att.-Gen. for Alberta v. Att.-Gen. for Canada*, [1928] A. C. 475 (estates of intestates without next-of-kin); *R. v. Att.-Gen. for British Columbia*, [1924] A. C. 213 (*bona vacantia* of companies).

(*p*) (1842), 10 M. & W. 117, 124.

Commons, is made for subjects and not for the Crown," still, if the King is desirous of performing some act in his natural capacity as an Englishman, and not in his public and royal capacity, it is a general rule that "the King may take the benefit of any particular Act, although he be not especially named in it" (q). Thus, in 7 Co. Rep. 32, the question was discussed whether the King, being tenant in tail, might by fine levied bar the estate tail by virtue of the statute *De Donis*, and it was there stated by Lord Coke, who was then Attorney-General, that the King could bar an entail; "for as he claims in respect of his natural capacity as heir of the body of a subject, and not in respect of his public and royal capacity, it would be hard that the King, being issue in tail of a gift made to a subject, should be in a worse condition than if he had not been King" (r).

A doubt has been expressed as to whether the Crown can take advantage of a statute which is not binding on it (s).

Statutes binding the Crown without special mention.

6. In the *Magdalen College Case* (t) it is said that there are three kinds of statutes which always bind the King without specially naming him (u).

(i) *Statutes for maintenance of religion, learning, and the poor.* The first kind is, statutes "that provide necessary and profitable remedy for the maintenance of religion, the advancement of learning, and the relief of the poor." Under this head Coke classes 13 Eliz. c. 10, upon the construction of which the question in the *Magdalen College Case* turned. "God forbid," he says, "that by any construction the Queen, who made the Act with the assent of the Lords and Commons, should be exempted out of this Act of 13 Eliz., which provides necessary and profitable remedy for the maintenance of religion, the advancement of good literature, and the relief of the poor." "It is to be known," he adds, "that the law never presumes that any one will do a thing either against religion or any religious duty." But this obligation has been held not to include the payment of poor-rates (x). Similarly, it was laid down in the *Case of*

(q) 1 Bl. Comm. 262.

(r) In *Duke of Brunswick v. King of Hanover* (1848), 6 Beav. 1; *affd.*, 2 H. L. C. 1, it was suggested that a foreign sovereign could be sued in England in matters affecting his private capacity, although as a king he was exempt from British law. See Hall, *Int. Law* (8th ed.), p. 220. But this doctrine was rejected in *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149. For a summary of the principles whereby immunity from process in municipal Courts is accorded to foreign sovereign States, see *Dollfus Mi g et Cie. S. A. v. Bank of England*, [1949] Ch. 369, 382-386. Reversed, [1950] Ch. 333, on new facts disclosed by the Court of Appeal but apparently not disapproving of Jenkins, J.'s summary below.

(s) *Cayzer Irvine & Co. v. Board of Trade*, [1927] 1 K. B. 269, 294, Scrutton, L.J.; Maxwell, 9th ed., p. 147.

(t) (1616), 11 Co. Rep. 74 b.

(u) Dr. Woodeson (*Vinerian Lectures*, vol. i, p. 31) says with regard to the kinds of statutes which are mentioned by Coke as being exceptions to the general rule, "This is surely opening a very uncertain latitude."

(x) See p. 399, *ante*.

Ecclesiastical Persons (y), that "all statutes which are made to suppress wrong, to take away fraud, or to prevent the decay of religion, shall bind the King, although he be not named, for religion, justice, and truth are the sure supporters of the crowns and diadems of kings." So, also, it was held in *R. v. Archbishop of Armagh* (z), that an Irish Act (10 & 11 Chas. 1) for the consolidation of endowed rectories and vicarages, as being an Act for the advancement of religion, bound the Crown, although it was not named.

(ii) *Statutes for suppression of wrong.* The second kind of statutes mentioned in the *Magdalen College Case* as binding the King when he is not named are statutes for the suppression of wrong (a). "The King," says Coke, "is the fountain of justice and common right, and the King, being God's lieutenant, cannot do a wrong, *Solum rex hoc non potest facere quod non potest injuste agere* (b). And although a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of it and to suppress a wrong shall bind the King." In support of this doctrine he cites the decision in *Willion v. Berkley* (c), that the statute *De Donis Conditionalibus* (13 Edw. 1, c. 1) bound the King. "If a tenant in tail before the statute *De Donis* had alienated, it was tortious, but no remedy was given for it until the statute *De Donis* was made, and Lord Berkley's case was, that land was given to King Henry VII and to the heirs male of his body, and the question was whether the King could aliene or not. And it was adjudged that he could not aliene, but that he was restrained by the said Act for three reasons. (1) Because such alienation before the statute was wrongful, although such wrong wanted remedy; for it would be a hard argument to grant that the statute which restrains men from doing wrong and ill should permit the King to do it. (2) Forasmuch as the said Act is *statutum remediale*, and provides a remedy for this remediless wrong, and that it was necessary and profitable to provide such remedy, it was adjudged that it should bind the King. (3) Because it was an Act of preservation of the possessions of noblemen, gentlemen, and others, it should also bind the King." Coke also (11 Co. Rep. 72 b) reports a resolution of the Court of King's Bench to the effect that the statute of 13 Edw. 1, c. 5, against tortious usurpation, being an Act to suppress wrong, was binding upon the King. He also says that it was held in *Beaumont's Case* (d), that 32 Hen. 8, c. 28 (concerning discontinuances, passed to prevent husbands from alienating during coverture the lands belonging to their wives), bound the King, although he was not named in it, because it was made

(y) (1601), 5 Co. Rep. 14a.

(z) (1721), 1 Str. 516.

(a) In *Mayor, etc., of London v. Att.-Gen.* (1848), 1 H. L. C. 440, 448, the question whether "a statute which affects a transfer of the jurisdiction from one Court to another, or the extension of the jurisdiction of a Court," binds the Crown was raised, but was not decided. See p. 403, *ante*.

(b) See Broom, *Legal Maxims* (10th ed.), 21.

(c) (1562), Plowd. 223, 246.

(d) (1553) 2 Co. Inst. 681 *cit.*

to suppress a wrong. Plowden says (Comm. 236 b) that the Statute of Merton (20 Hen. 3), c. 5, which enacts that usuries shall not run against any being within age, binds the King, so that "if the King give land to another reserving a rent payable at a feast certain, and for default of payment that he shall double the rent for every default, and afterwards the grantor dieth, his heir, being within age, he shall not double the rent to the King" (e). "For," says Plowden, "although the statute is general, yet the King is bound by it, because it is made for remedy of infants and for the public good." Plowden also says (Comm. 236 b) (f) that "the Statute of Merton (20 Hen. 3), c. 10, which ordains that every freeman which oweth suit . . . may freely make his attorney to do these suits for him, includes the King in the general words, because the Act is made for the ease and convenience of subjects." With regard to 31 Eliz. c. 6, s. 4, which enacts that simoniacal presentations to benefices shall be void, and that "the person so corruptly taking . . . any such benefice . . . shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice," Coke says (1 Inst. 120 a) "that the Act, being made for the suppression of simony and such corrupt agreements, so binds the King in that case as he cannot present him that the law hath disabled." Again, with respect to 27 Eliz. c. 4, which enacts that "every conveyance made to the intent and of purpose to defraud and deceive any purchasers, shall be deemed only against such purchaser to be utterly void," he says (11 Co. Rep. 74 a) "that if one who intends to sell his land had by fraud conveyed it, by deed enrolled, to the Queen to the intent to deceive the purchaser . . . in that case the purchaser shall enjoy the land against the Queen by the statute of 27 Eliz. c. 4, for, although the Queen is not excepted, yet the Act, being general and made to suppress fraud, shall bind the Queen." Of 3 Edw. 1, c. 5, which enacts that none shall disturb elections under pain of great forfeiture, he says (2 Inst. 169) "the Act is penned in the name of the King—viz., the King commandeth, and therefore the King bindeth himself not to disturb any electors to make free election" (g). Of 52 Hen. 3, c. 22, which enacted that none may distrain his freeholders to answer as to their freehold, *quia hoc nullus facere potest sine praecepto Domini Regis*: he says (2 Inst. 142) "This Act doth bind the King, for there is a writ directed to the King's bailiff of his manor of N., the words whereof be . . . and if the King's bailiff doth not obey this writ, the tenant shall have attachment against him" (h). In *Crooke's Case* (i), the question was whether the King was bound by 22 Car. 2, c. 11, by which it was enacted that two certain parishes in London should be united and established as one parish, and that the first presentation should be made by the patron

(e) In 2 Inst. 89, Coke mentions this as an alternative explanation of this statute.

(f) In 2 Inst. 99, Coke is silent as to whether the statute binds the King or not.

(g) See also *Att.-Gen. v. Bishop of London* (1693), 4 Mod. Rep. 200, 207.

(h) See also Show. 209.

(i) (1690), 1 Show. 208.

of that living whereof the endowment was of the greatest value. The King was the patron of that church which was of least value, but it was contended that by his prerogative he had a right to present first, and that this statute did not bind him, as he was not expressly named, but it was held otherwise, and the presentation by the other patron was confirmed. Again, in *R. v. Tuchin (j)*, the question was whether 14 Edw. 3, stat. 1, c. 6, which enacted that no process should be annulled or discontinued by a mistake in writing, "but as soon as the thing is perceived by the challenge of the party, it shall be hastily amended in due form," extended to the Crown, and it was held by Powell, J., that it did not, "because the Queen is never named in an Act of Parliament by name of party." It seems, therefore, that, except for this expression, he would have held the Crown to be bound by this Act. A similar point was discussed in *R. v. Wright (k)*, where the question was whether 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, which enacted "that writs of error upon any judgment given by any of the said Courts [*i.e.*, King's Bench, Common Pleas, and Exchequer] shall hereafter be made returnable only before the judges of the other two Courts in the Exchequer Chamber," applied to judgments upon indictments, the Crown not being especially named in the Act. As the point was raised by the Court itself, the Crown not disputing its liability, only one side was heard, and no considered judgment was given, but all these earlier decisions were cited in argument and apparently acquiesced in. Again, in *R. v. Ridge (l)*, the question was whether certain bills, which had got into the hands of the Crown, but which, it was admitted by the Crown, were void as between the original parties as being tainted with usury, could be sued upon by the Crown on the ground that the usury laws, which did not specially name the Crown, could not bind it. It was held as being perfectly clear that, as the bills would have been void in the hands of an ordinary third person, their vice could not be removed by the fact that the third person in this case was the Crown. "This is too monstrous a proposition," said Garrow, B., "for serious consideration, and would require to be supported by undoubted authority." In *Baron de Bode v. R. (m)*, the question was raised whether a writ of error would lie to the Exchequer Chamber in a case in which the Crown was the real party "because it is said that the statute by which this Court is constituted, 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, did not bind the Crown. That statute enacts that 'writs of error on any judgment hereafter shall be made returnable only before the Judges and Barons or the Judges only of the other Courts'; and it was argued that such general words did not affect the Queen's right to bring or have a writ of error brought to the House of Lords. We think the Crown is bound by that statute. The rule on the subject is stated in Com. Dig. Parliament (R. 8) and is very fully explained

(j) (1704), 2 Ld. Raym. 1061, 1066; 14 St. Tr. 1095.

(k) (1834), 1 A. & E. 434.

(l) (1817), 4 Price 50, 57.

(m) (1849), 13 Q. B. 364, 378, Wilde, C. J.

in *Att.-Gen. v. Allgood* (n). A difference is there remarked on between statutes which name parties plaintiffs or defendants, which do not apply in words to the Crown, and statutes which use words sufficiently large to include the Crown, which is the present case and where the Crown is to be taken out of the statute by construction."

(iii) *Statutes that tend to perform the will of a founder or donor.* The third kind of statute mentioned by Coke in the *Magdalen College Case* (o), as binding the King when he is not named, are statutes which tend to perform the will of the founder or donor. "That appears," he says, "*in Statuto Templariorum* (17 Edw. 2, stat. 2), where it is said, *Ita semper quod pia et celeberrima voluntas donatoris in omnibus teneatur et expleatur, et perpetuo sanctissime perseveret.*" He cites, in support of this proposition, the statute *De Donis Conditionalibus* (13 Edw. 1, c. 1), "which," says he, "is notable to this purpose, for there it appears that it was necessary and profitable that the will of the donor should be observed, the words of which Act to this purpose are, *Propter quod Rex Dominus, perpendens quod necessarium et utile est apponere remedium, statuit, quod voluntas donatoris in carta doni sui manifeste expressa de cætero observetur*, which bound the King, as is adjudged in *Lord Berkley's Case* in Plowden's Comm., where it is said, that men ought to observe the intent or will of other men, and to violate it is ill." It does not appear that this doctrine has been acted upon since Coke's time, so that it is difficult to say what view the Courts would take of it at the present day.

These are the principal cases in which it has been held that the Crown is bound by statutes without being named in them. These cases are scarcely sufficient in number or variety to justify the very general adoption of the propositions propounded by Coke in the *Magdalen College Case* (o), with regard to the kind of statutes by which the Crown is bound without being named; at the same time there does not seem to be any case in which Coke's propositions are either denied or overruled. And in *Ex p. Postmaster-General* (p), Jessel, M.R., said: "The general rule, as expressed in Bacon's Abridgment (q), is that 'where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, although not particularly named therein.'"

Statutory duties imposed upon the Crown.

7. If a duty is thrown directly upon the Crown by statute there was formerly no way of enforcing the performance of that duty if it was left unperformed by the Crown (r). If a subject neglects to perform a statutory duty, there are several ways in which he may be proceeded

(n) (1743), Parker 1.

(o) (1616), 11 Co. Rep. 66b, 72a.

(p) (1879), 10 Ch. D. 595, 601.

(q) 7th ed., at p. 462.

(r) See now Crown Proceedings Act, 1947, p. 412, *post*.

against (s), but no proceedings of any kind could be taken either against the Crown itself or against any servant of the Crown to compel the performance of the statutory duty devolving on the Crown. For no action of tort could before 1948 be brought against the Crown upon any statute, in the absence of express provisions, in consequence of the maxim that the King can do no wrong (t). This rule had in Canada the curious result that persons injured on State railways had no remedy (u) until 1881 (x). This immunity continued till recently in the United Kingdom (y), but in many Dominions and colonies had been qualified or restricted by statute (z). The immunity excluded any remedy by mandamus. Thus, in *R. v. Lords of the Treasury* (a), it appeared that section 14 of the Exchequer and Audit Departments Act, 1866, enacted that where any sum of money had been granted to Her Majesty to defray expenses for any specified public service, it should be lawful for Her Majesty to authorise and require the Treasury to issue, out of the credits granted to them, the sums that may be required to defray such expenses. By the Annual Appropriation Acts prior to 1889 a certain sum was applied to defray the charges for prosecutions at assizes and quarter sessions. The charges for certain prosecutions having been taxed in the ordinary way, the Lords of the Treasury refused to pay certain items, whereupon a writ of mandamus was moved for to compel them to do so, on the ground that it was a duty thrown upon them by statute. But the writ was refused. "When," said Cockburn, C.J., "a duty has to be performed (if I may use the expression) by the Crown, this Court cannot claim, even in appearance, to have any power to command the Crown. The thing is out of the question, over the Sovereign we can have no power. In like manner, when parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction" (b). The subject was fully discussed in *R. v. Secretary of State for War* (c), where it was

(s) See pp. 211 *et seq. ante*.

(t) Robertson's Civil Proceedings by and against Crown, p. 350; Anson Constitution, vol. ii, pt. ii (1935), p. 336, and xxxviii L. Q. R. 141, 280. See also *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517; and *Hulton v. Secretary of State for War* (1926), 43 T. L. R. 106.

(u) *R. v. M'Leod* (1883), 8 Canada 1; cf. *R. v. Macfarlane* (1882), 7 Canada 216.

(x) 44 Vict. c. 25 (Canada). See Rev. Stat. Canada.

(y) But see the Workmen's Compensation Acts, 1906, s. 9, and 1925, s. 33, which applied the Act to workmen employed by or under the Crown and persons in the private service of the Crown (Royal Household), but not to persons in the naval or military service of the Crown.

(z) *Att.-Gen. for Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192; cf. the Claims against the Commonwealth Act, 1902 (No. 21 of 1902); *Bond v. Commonwealth* (1903), 1 Australia C. L. R. 13, 23, Griffith, C.J. The anomalous nature of this remedy against the Crown, and the inconvenience of reference to England for leave to pursue it has led to legislation in colonies providing another remedy. See the Claims against Government and Crown Suits Acts, 1897 and 1904 (N. S. W.).

(a) (1872), L. R. 7 Q. B. 387, 394.

(b) See cases collected in Short and Mellor, Crown Practice (2nd ed.), 202—204; Robertson, Civil Proceedings by and against Crown (1908), c. iii, pp. 111 *et seq.*

(c) [1891] 2 Q. B. 332.

pointed out that any obligation imposed on a servant of the Crown by statute or royal command is not enforceable by mandamus unless the statute makes it clear that the duty or trust imposed is not as between the Crown and its agent, but as between the agent and the subjects (*d*). This rule of non-liability did not apply to cases where particular departments or officers of State had under statute duties of a ministerial character, or quasi-judicial character (*e*). A declaratory judgment might have been given declaring illegal an action contemplated by the Crown, but not so as to prejudice a question that might have been the subject of a petition of right (*f*).

Since January 1, 1948, by the Crown Proceedings Act, petitions of right, Latin and English informations and other ancient forms of proceedings for and against the Crown are abolished, and all civil proceedings in which the Crown is involved are governed by the rules of Court; the procedure being as far as possible assimilated to that between subjects (see *supra*, p. 394). The subject has thus now an absolute right to sue the Crown whether in contract or tort, including breaches of statutory duty which if committed by a subject would give rise to liability in tort (s. 2 (1) (2)). Section 21 (following clause 4 of the Crown Proceedings Bill, 1927) empowers the Court to grant any remedy against the Crown except an injunction, a decree for specific performance, or an order for the specific restitution of property.

On the other hand, if Government departments or officials assume an authority the subject is entitled to rely upon that assumption, as he does not know nor could be expected to know the limits of that authority and the subject ought not to suffer if that authority has in fact been exceeded. As Denning, L.J., pointed out (*g*), this principle is of particular importance today when such departments and officers are given authority by orders and circulars not available to the public.

(*d*) See *Kinloch v. Sec. of State for India* (1882), 7 App. Cas. 619. *Re Dulles' Settlement*, [1951] Ch. 265.

(*e*) Where a statutory duty was cast on a department of State to determine the proportions in which a pension was payable out of local or State funds, a mandamus to determine such proportion would lie: *R. v. Treasury*, [1909] 2 K. B. 183, 191; and see pp. 14, 215, *ante*.

(*f*) *Dyson v. Att.-Gen.*, [1912] 1 Ch. 158; followed in *Burghes v. Att.-Gen.*, [1911] 2 Ch. 139; [1912] 1 Ch. 173; *Grant v. Knaresborough U. D. C.*, [1928] Ch. 310; *Bombay and Persia Steam Navigation Co. v. MacLay*, [1920] 3 K. B. 402, 408. Rowlatt, J; *Egan v. Att.-Gen.*, [1931] A. C. 113.

(*g*) *Falmouth Boat Construction Ltd. v. Howell*, [1950] 2 K. B. 16, 26.

CHAPTER VIII

TERRITORIAL EFFECT OF BRITISH STATUTES

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The territorial effect of British statutes may be conveniently discussed under the following heads:—

- (1) Upon British subjects and their property, real and personal, whether they reside within or without the King's dominions;
- (2) Upon land in that part of the United Kingdom to which the statute applies, whether the persons interested in the land are or are not there domiciled;
- (3) On the persons of foreigners;
- (4) On the property of foreigners out of British jurisdiction;
- (5) In parts of the British Islands other than England; and
- (6) In the Colonies (a).

On British subjects and their property.

1. *British subjects within or without realm may be bound.* The general rule as to the effect of a British Act of Parliament upon a British subject was stated by Sir T. Wilde *arguendo* in the *Sussex Peerage Claim* (b), to be that "the British Parliament possesses the power to impose

(a) As to effect of colonial legislation, see *post*, ch. ix.

(b) (1844), 11 Cl. & F. 85, 95; reported also in 6 St. Tr. (N.S.) 79.

restrictions and disabilities and incapacities upon any British subject, which shall operate upon him anywhere." This general rule was accepted by the House of Lords, and it was held by them on this ground that the Royal Marriage Act, 1772, which enacts in section 1 that "no descendant of the body of George II shall be capable of contracting matrimony without the previous consent of His Majesty . . . and that every marriage of any such descendant without such consent first had and obtained shall be null and void," operated to render void a marriage contracted by a descendant of George II in Rome. It had been argued on behalf of the claimant to the peerage that this Act only applied to marriages contracted in England; but the Judges who were consulted gave it as their opinion that the intention of the Act was clearly to create "an incapacity attaching itself to the person of A B, which he carries with him wherever he goes, for," they added, "it is clear that an Act of the Legislature will bind the subjects of this realm, both within the kingdom and without, if such is its intention" (c).

But whether any particular Act of Parliament purports to bind British subjects abroad will always depend upon the intention of the Legislature, which must be gathered from the language of the Act in question; there is no presumption either one way or the other, although from time to time Judges pronounce *dicta* expressing a prepossession for or against the presumption that Parliament intends to legislate for British subjects wherever found (d).

Accordingly it has been held that section 54 of the Marriage Act, 1836, which invalidates marriages within the prohibited degrees of consanguinity, applies to marriages of domiciled British subjects wherever celebrated (e), and that section 57 of the Offences against the Person Act, 1861, makes bigamy by a British subject an offence punishable by English law wherever committed (f). On the other hand, an Irish statute relating to the mode of celebration of marriages has been held to apply only to marriages celebrated in Ireland (g).

"Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects wherever they may be, such jurisdiction is valid; but, apart from statutes, a Court has no power to exercise jurisdiction over any one beyond its limits" (h).

(c) *Ibid.*; 11 Cl. & F. 144; *Niboyet v. Niboyet* (1878), L. R. 4 P. D. 1, at p. 19. Brett, L.J.

(d) See *Rosseter v. Cahlmann* (1853), 22 L. J. Ex. 128, 129, *per* Pollock, C.B.

(e) *Brook v. Brook* (1861), 9 H. L. C. 193; *Re De Wilton*, [1900] 2 Ch. 481. (A marriage abroad between domiciled British Jews invalid as not complying with British marriage laws, though valid by the Jewish faith.) Cf. *Re Lawson's Trusts*, [1896] 1 Ch. 175.

(f) *R. v. Russell (Earl)*, [1901] A. C. 446.

(g) *Swift v. Att.-Gen. for Ireland*, [1912] A. C. 276, p. 442 *post*.

(h) *Re Busfield* (1886), 32 Ch. D. 123, 131, Cotton, L.J. *Dubout et Cie. v. Macpherson & Co.* (1889), 58 L. J. K. B. 496.

Statutes as to crimes. With respect to statutes creating crimes the rule has been thus stated: "All crime is local (*i*). The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever" (*k*).

This statement is, however, subject to certain exceptions—e.g., piracy *jure gentium* (*l*), and cases within the Foreign Jurisdiction Acts (*m*). But no independent foreign State recognises the liability of its subjects to punishment in a foreign State for offences committed within the borders of the State to which the offender belongs (*n*), except in those cases where an Act initiated in one country is intended to take effect and does take effect in another (*o*). In the Explosive Substances Act, 1883, Parliament was careful to exclude aliens from the extra-territorial operation of the statute (*p*).

"When we speak of the right of a State to bind its own native subjects everywhere, we speak only of its claim and exercise of sovereignty over them when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of the other nations within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and policy" (*q*).

Realty of British subject which is outside the realm not bound. All the authorities in England and the United States recognise in its fullest import the principle that real estate or immovable property is *exclusively* subject to the laws of the Government within whose

(*i*) This statement must be read subject to the right of a State to treat as offences against its law acts initiated outside, but taking effect within, its territory; see 1 Russell on Crimes (8th ed.), 52, 56; Wharton: Conflict of Laws (2nd ed.), s. 823; J. B. Moore: Digest of International Law, vol. ii, p. 243, s. 202.

(*k*) *MacLeod v. Att.-Gen. of N. S. W.*, [1891] A. C. 455, 458, Halsbury, L.C.; *Banco de Vizcaya v. Don Alfonso*, [1938] 1 K. B. 140, and see *Poll v. Dambe*, [1901] 2 K. B. 579, and *Re The Criminal Code Sections Relating to Bigamy* (1897), 27 Canada 461, held binding in *R. v. Brinkley*, [1907] O. L. R. 434, 455.

(*l*) See *Att.-Gen. for Hong Kong v. Kwok a Sing* (1873), L. R. 5 P. C. 179.

(*m*) As to legislation for countries in which the Crown has foreign jurisdiction by Order in Council and treaty, see *Secretary of State v. Charlesworth*, [1901] A. C. 373; Jenkyns: *British Rule and Jurisdiction Beyond the Seas*, 1902, chap. vii, and Hall: *Foreign Jurisdiction of the British Crown*, 1894.

(*n*) The Larceny Act, 1896, was drawn so as to punish possession in the United Kingdom of property stolen, etc., abroad, thus avoiding the conflict with international views which would have been involved by punishing here theft by foreigners abroad; see now Larceny Act, 1916, s. 33 (4).

(*o*) E.g., Treason and treason felony; foreign enlistment, homicide, bigamy, slave dealing; see 1 Russ. Cr. (8th ed.), 56, and *Savarkar's Case*, [1910] 2 K. B. 1056.

(*p*) See *R. v. Jameson*, [1896] 2 Q. B. 425, as to the Foreign Enlistment Act, 1870. The Territorial Waters Jurisdiction Act, 1878, is based on a claim of territorial jurisdiction over the waters referred to in the Act.

(*q*) Story: Conflict of Laws (8th ed.), s. 22; *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Badische Anilin und Soda Fabrik v. Basle Chemical Works*, [1898] A. C. 200.

territory it is situate. It is subject to the *lex situs* (r). "So firmly is this principle established, that in cases of bankruptcy the real estate of the bankrupt situate in foreign countries is universally admitted not to pass under the assignment" (s). This rule does not, however, apply as between the United Kingdom and the rest of the King's dominions, inasmuch as the British Parliament was until 1931 constitutionally competent to legislate for the whole (t). For instance, the Bankruptcy Act, 1869, was held to apply to all Her Majesty's dominions and to affect a bankruptcy in Lagos (u). It has more than once been contended in Canada that the British North America Act, 1867, amounted to an abdication by the Imperial Parliament of all legislative authority in Canada in respect of the matters dealt with by that Act. This contention appears to have been based on reasoning founded on the Constitution of the United States, and has been rejected by the Canadian Courts. Thus, in 1879 it was contended that the Imperial Medical Acts of 1858 and 1868 were overridden by the British North America Act, 1867, and by an Ontario Act of 1874 passed in exercise of the legislative authority given by the Act of 1867. But it was held that the Imperial Act of 1858 overrode the colonial Act, and was not impliedly repealed by the Act of 1867 (x).

Personalty of domiciled British subjects. While the general rule with regard to land or rights or obligations connected with land, which are treated by the *lex situs* as immovables, is that they are governed by the *lex situs*, the rule for movables, or things treated as such by the law of the country where the things are situate, is stated by Story to be that they are governed by the law of the deceased's domicile (y). Consequently a British statute binds the personal property of a domiciled British subject wherever situate. It was therefore formerly stated generally that movables are governed by the law of the domicile. Hence the maxim, described as misleading (z), *Mobilia sequuntur personam*. Thus Story says (y): "The right and disposition of

(r) Story, *l. c.*, s. 428; *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602; *Deschamps v. Miller*, [1908] 1 Ch. 856. Dicey: *Conflict of Laws* (6th ed.), 168. This rule does not preclude British Courts from acting *in personam* in cases arising out of contracts or equities relating to land abroad: *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354; 2 Ch. 502 (reversed on a question of construction, [1912] A. C. 52).

(s) Story, *l. c.*, s. 428.

(t) Cf. Bankruptcy Act, 1914, ss. 18 (1) and 167. The Act does not apply to Scotland or Ireland except as expressly provided, s. 167 (2). See the statutory limitations imposed by the Statute of Westminster, 1931, on the power of the Parliament of the United Kingdom to legislate for the Dominions (Appendix C).

(u) *Callender Sykes & Co v. Colonial Secretary of Lagos and Davies*, [1891] A. C. 460; p. 448 *post*.

(x) *R. v. College of Physicians and Surgeons* (1879), 44 Upp. Can. Q. B. 564, 576. As to the power under this Act of punishing in Canada offences not committed there, see *Re The Criminal Code Sections Relating to Bigamy* (1897), 27 Canada 461.

(y) Story: *Conflict of Laws*, s. 376; *Winans v. Att.-Gen.* (No. 2), [1910] A. C. 27, 32, Lord Atkinson.

(z) Dicey: *Conflict of Laws* (6th ed.), 558; Westlake: *Private International Law* (7th ed.), 184, 190.

movables is to be governed by the law of the domicile of the owner, and not by the law* of their local habitation." There is also the well-known *dictum* of Lord Loughborough in *Sill v. Worswick* (a) : "Personal property has no visible locality, but is subject to that law which governs the person of the owner. With regard to the disposition of it, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he is a subject, that will regulate the succession. And . . . if a bankrupt [in England] happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but that it will give effect to the title of the assignees." It is now generally agreed that this statement of Lord Loughborough is too wide and that the maxim only applies to general assignments made on marriage or death. The difficulty of the subject is caused partly by the adherence in the older authorities to the letter of the maxim and partly by the confusion caused by including within the term "personal property" both movables and intangible things such as choses in action. Accordingly with regard to intangible things "it is recognised that an artificial *situs* or *quasi-situs* may have to be ascribed to them for different legal purposes" (b). "(The maxim)," said Lord Selborne, "is certainly not meant to apply arbitrarily in a new sense because Lord Loughborough used the word 'personal' instead of 'movable.' The doctrine depends on a principle which is expressed in the Latin words and that is the only principle of our law as to domicile when applicable to the succession of what we call personal estate" (c).

This is of course not to deny that the law of the domicile is supreme in its own sphere of family law. If a man dies domiciled abroad possessed of personal property the question whether he has died testate or intestate and also all questions relating to the distribution and administration of the personal estate belongs to the Judge of his domicile and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration (d). Lord Atkinson pointed out that liability to succession and legacy duty follow the maxim but not probate or estate duty. In these cases the *lex situs* applies. So the language of Lord Westbury in *Enohin v. Wylie* (e), where he said that the Court of the domicile is to determine all questions of testacy or intestacy, the construction of wills and the rights of those who claim to be next of kin. In that case an Englishman domiciled

(a) (1791), 1 H. Bl. 665, 690.

(b) Dicey, *op. cit.* (5th ed.), 971; (6th ed.), 386, 529.

(c) *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461, 466.

(d) Lord Westbury, L.C., in *Att.-Gen. v. Campbell* (1872), L. R. 5 H. L. 524, 529, quoted by Lord Atkinson in *Winans v. Att.-Gen.* (No. 2), [1910] A. C. 27, 32. Cf. *Atkinson v. Anderson* (1882), 21 Ch. D. 100.

(e) (1862), 10 H. L. C. 1, 13, 19.

in Russia had left personal property in this country. Lord Cranworth said: "The duty of administration is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicile". This is said by Foote to be too wide (f), in so far as it asserts that the Court of domicile is *exclusively* entitled to administer the estate of the deceased testator or intestate. On the contrary whenever administration or probate has been obtained in England, the English Court will make a general decree for administration of all the assets wherever situate: the principle being that the executors, trustees and administrators are personally subject to its jurisdiction and should be controlled by it.

Lord Cranworth's *dictum* (above) may be illustrated by the case of *Re Craven's Estate, Lloyds Bank v. Cockburn* (No. 1) (g). An Englishwoman domiciled in England gave her son a power of attorney over money in a bank at Monaco. The testatrix died and her estate was administered in this country. The question was whether this was a valid *donatio mortis causa* as the power had been given on the eve of an operation from which the testatrix feared she might die, which proved to be the case. Farwell, J., held that the question of the validity of the *donatio* was one arising in the administration of the estate and must therefore be determined according to English law, but the question as to whether the acts done were sufficient to constitute a parting with the domination of the property in Monaco, must be determined by the law of Monaco.

There is however no doubt that the law of the domicile determines all questions of succession to the movables of the deceased, but that law is no longer held to affect the transfer or assignment of movables and according to Dicey "it has been said that all the maxim *mobilia sequuntur personam* means today is that succession to movables is governed by the personal law of the deceased—the *lex domicilii*" (h). So in *Re Korvine's Trusts* (i), where a Russian resident in London died intestate and was held to have made a good *donatio mortis causa*. If the question had been a succession under a testamentary disposition or an intestacy, the law to be applied would be the law of the domicile.

Transfer of movables. With regard to the transfer of movables *inter vivos* in contract, the "proper law" of the contract must be ascertained from the intention of the parties as to the law by which they intended their agreement to be governed. They may have either expressly or impliedly indicated their intention in the terms of their agreement (k). In the absence of these indications the parties will be presumed to have contracted on the basis of the *lex loci contractus* (l).

(f) Foote, *Private Int. Law* (5th ed.), p. 298.

(g) [1937] 1 Ch. 423.

(h) *Dicey, op. cit.*, 559. *Alberta Provincial Treasurer v. Kerr*, [1933] A. C. 710. 718, 721.

(i) [1921] 1 Ch. 343.

(k) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *The Cap Blanco*, [1913] P. 130; *The Adriatic*, [1931] P. 241.

(l) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122.

On the other hand the contract may indicate that the parties contemplated the *lex loci solutionis*, the law of the place where the contract was to be performed (*m*). Other indications may arise from the form and language of the contract (*n*), or from a provision in the contract that the parties shall be bound by the law of a particular country (*o*), or will submit to arbitration in a particular country (*p*).

The standard works on the law of contract will furnish details of these rules of construction. All that can be done here is to very briefly refer to them. And this applies *a fortiori* to the subject of the transfer of intangible things such as debts and other choses in action. What law is to govern their transfer? This has been and is still a matter of conflict between learned writers on the subject, and an attempt must be made to summarize their views in the absence of any overriding decisions by the Courts. "It sometimes happens," says Dicey, "that there is a real difficulty in affixing to property, especially when it consists of debts and other choses in action, its due local position. Of the latter it was formerly said *mobilia sequuntur personam*—that they had no locality. But this view is not now generally adopted in England" (*q*). He thinks that it is recognised that a *situs* or *quasi situs* is to be ascribed to intangible things for different legal purposes. The editors of the sixth edition of Dicey say: "There is an acute conflict of opinion among writers on the conflict of laws as to what law should govern the transfer or assignment of intangible things. Story and Phillimore say that the law of the creditors domicile is the test. But this view is a relic of the outworn maxim *mobilia sequuntur personam* and is not adopted by modern writers. . . . Westlake and Dicey said that the *lex situs* of the debt is the test" (*r*). This is said to be untenable in the light of the decisions in two modern cases.

In *Republica de Guatemala v. Nunez* (*s*), the donor and donee were both domiciled in Guatemala. The donor purported to assign to the donee money deposited in a bank in London. The assignment would have been good if the English law governed it. It however did not comply with certain formalities required by the law of Guatemala; moreover the donee was a minor, but no question turned on his capacity, for this depended either on the *lex domicilii* or the *lex loci actus* and in that case these were the same (*t*). Scrutton, L.J., said: "Where a transaction is invalid or a nullity by the law of the place where the transaction takes place owing to the omission of formalities

(*m*) *Benaim v. Debono*, [1924] A. C. 514, 520. Chitty, Contract (20th ed.), pp. 162, 163.

(*n*) *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; [1912] A. C. 52.

(*o*) *Austrian Lloyd S. S. Co. v. Gresham Life Assurance Society*, [1903] 1 K. B. 249.

(*p*) *Hamlyn v. Talisker Distillery* (*supra*); *Norske Atlas Insurance Co. v. London General Insurance Co.* (1927), 43 T. L. R. 541.

(*q*) Dicey, Conflict of Laws (6th ed.), p. 303.

(*r*) Dicey, *op. cit.*, p. 570.

(*s*) [1927] 1 K. B. 669.

(*t*) *Ibid.* 690, Scrutton, L.J.

or stamp, it will not be recognised in England. . . . It seems to me therefore that the authorities cited by Mr. Dicey do not support the proposition that a transaction as to an English debt, void by the law of the country where it takes place and by the law of the domicil of the parties to it, will be treated as valid in the country where the debt is deemed to be situated" (u). As to the question of the donee's minority, Lawrence, L.J., said: "In the absence of any binding authority, I decline to accept as sound the proposition that the English Courts will treat as valid an assignment of a movable where the assignee is owing to his minority incapable of taking both under his *lex domicilii* and under the *lex loci actus*" (x). The second case is *Re Anziani* (y), where a domiciled Italian executed an assignment of a chose in action situate (as far as possible) in England. The assignment was not made with the formalities required by the Italian law and Maugham, J., held, following the *Guatemala Case* (supra), that the deed in so far as it purported to assign movable property was subject to the law of Italy as the country in which it had been executed and in which the testatrix was domiciled. As it was null and void by the Italian law, it was ineffective as an assignment.

These cases therefore establish the *lex loci actus* as the test in the circumstances therein prevailing. An older case *Alcock v. Smith* (z) appears to rely also on the *lex loci actus*. There a bill of exchange drawn, payable and accepted in England was indorsed in Norway and while current in the hands of an agent of a debtor, residing in London, was seized in execution under a Norwegian judgment and sold in auction. By Norwegian law the sale conferred on the purchaser a good title free from equities. The bill now overdue was sent to London for collection. Before presentation, the firm in which the debtor was a partner obtained an injunction to restrain the drawer and acceptor from paying. The Court of Appeal held that the transaction was to be determined by Norwegian law and therefore the purchaser took a complete title free from equities and Kay, L.J., said: "As to personal chattels, it is settled that the validity of a transfer depends not upon the law of the domicil of the owner, but upon the law of the country where the transfer takes place. Our own law as to distress and market overt is illustrative of this."

The learned editors of the sixth edition of Dicey's Conflict of Laws sum up the matter thus (a):—As regards intangibles—(i) Questions of assignability are governed by the proper law of the debt; (ii) The

(u) *Ibid.*, pp. 691, 693.

(x) *Ibid.*, p. 701. Cf. Professor Graveson on this case, Conflict of Laws, 1949, pp. 194 ff.

(y) [1930] 1 Ch. 407, 422, disapproving Dicey Rule 153 (now in 6th ed., pp. 570 ff.).

(z) [1892] 1 Ch. 238, 267; cf. *Liverpool Marine Credit. v. Hunter* (1867), L. R. 4 Eq. 162, (1868) L. R. 3 Ch. App. 479, 483, where Lord Chelmsford appears to be referring either to the old view of the maxim *mobilia sequuntur personam* or to the fact that a creditor may seize his debtor's goods wherever they may be found.

(a) See pp. 571 *et seq.*

intrinsic validity of an assignment is governed by the proper law of the assignment; (iii) The question of priorities is governed by the proper law of the debt; (iv) The question of attachment or garnishment is governed by the *lex situs* of the debt.

As to tangibles Rule 129 reads as follows (b):— (i) A transfer of a tangible movable which is valid and effective by the proper law of the transfer (*lex actus*) and by the law of the place where the movable is at the time of the transfer (*lex situs*) is valid and effective in England; (ii) A transfer of a tangible movable which is invalid or ineffective by the *lex actus* and by the *lex situs* of the movable at the time of the transfer is invalid or ineffective in England.

Professor Cheshire (c) after setting out the different theories as to the transfer of choses in action decides in favour of the *lex actus*. He states the modern law at pp. 602 ff. of his work and sums up the problems of assignment as follows:—(a) Questions depending solely on the validity and effect of an assignment are decided by the *lex loci actus*; (b) Questions depending on transactions which created the debt are decided by the *lex situs*; (c) Involuntary assignments, e.g., garnishment, are decided by the *lex situs*.

Effect on realty or leaseholds held by subject or foreigner.

2. The maxim *mobilia sequuntur personam* is inapplicable to a bequest of an interest in land, because "land, whether held for a chattel or freehold interest, is in nature, as a matter of fact, immovable and not movable" (d). Real property is in all cases governed by the *lex situs*, and English Courts have no jurisdiction to adjudicate with reference to land out of England (e), nor will they recognise any foreign adjudication as to land in England (f).

In *Freke v. Lord Carbery* (g) where it was argued that a leasehold property situate in London was not subject to the limitations of the Accumulations Act, 1800 (h), Lord Selborne said: "The territory and soil of England by the law of nature and of nations which is recognised also as part of the law of England, is governed by all statutes which are in force in England. This leasehold property is part of the territory and soil of England, and the fact that the testator has a chattel interest, and not a freehold interest in it, makes it in no way whatever less

(b) Dicey, *op. cit.* p. 538.

(c) Private International Law (3rd ed.), 1947, pp. 559 *et seq.* Cf. Graveson *op. cit.*, pp. 173 *et seq.*

(d) *Duncan v. Lawson* (1889), 41 Ch. D. 398 (intestacy).

(e) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(f) See note "Decreasing Influence of the *Lex Situs*." Dicey (5th ed.), note 4, 884.

(g) (1873), L. R. 16 Eq. 461, 466. Cf. *Duncan v. Lawson* (1889), 41 Ch. D. 398; *Pepin v. Bruyère*, [1900] 2 Ch. 504; [1902] 1 Ch. 24; *Re Hovles, Row v. Jagg*, [1910] 2 Ch. 333; *Canterbury Corporation v. Wyburn*, [1895] A. C. 89, 96

(h) Usually known as the Thellusson Act.

so" (i). In *Birtwhistle v. Vardill* (k), the question was whether a child, born of domiciled Scottish parents who did not marry until after the child's birth, could inherit land in England. By the law of Scotland the child was legitimate, but by the Statute of Merton (20 Hen. 3, c. 9), "all the earls and barons with one voice answered that they would not change the laws of the realm, which hitherto have been used and approved," viz., that children not born in wedlock could not inherit land. Owing to this declaration of the law, it was held that the child could not take lands in England as the heir of his father. In the case of personal estate the child would have been entitled as next of kin under the Statute of Distributions (l). In *Curtis v. Hutton* (m), it was held that, although the Mortmain Act (9 Geo. 2, c. 36) did not extend to Scotland, still land in England could no more be devised for the benefit of a Scottish charity than of an English charity. "The validity of every description of real estate," said Sir Wm. Grant, M.R., "must depend on the law of the country in which the estate is situated. The object of the Statute of Mortmain is real estate in England. The owners of such property are disabled from disposing of it to any charitable use except by deed executed twelve months from the death of the owner to take effect from the execution. . . . It would be somewhat incongruous to refuse to permit such a disposition for the most laudable and meritorious charitable institution in England, but if the party chose to carry his benevolent intention beyond England, to permit him to do so to the effect of disinheriting his heir in his last moments."

The application of this rule is most frequently discussed with reference to claims by the revenue authorities.

In *Inland Revenue Commissioners v. Maple & Co., Paris, Ltd.* (n), the House of Lords held that the term "conveyance on sale" in the Stamp Act, 1891, applied to a French deed of apportion executed in France, transferring property from one English company to another English company in consideration of shares in the transferee company to be issued and delivered in England to the transferor company. The *ratio decidendi* was that the deed related to a matter or thing to be done in the United Kingdom (n).

"An Act of the Imperial Parliament never imposes duties on or in respect of immovable property which is not situate in the United Kingdom" (o), but it occasionally imposes such duties on the proceeds

(i) This principle applies even when land is held in England by a foreign Sovereign or diplomatist. Royal and diplomatic privileges do not extend to real property, except to an exemption from levy of rates and taxes on such persons in respect thereof.

(k) (1840), 7 Cl. & F. 895.

(l) *Re Goodman's Trusts* (1881), 17 Ch. D. 290; Dicey, *Conflict of Laws* (6th ed.). 494—507.

(m) (1808), 14 Ves. 537, 541.
(n) [1908] A. C. 22. Reversing S. C., [1906] 1 K. B. 591, on the ground that the deed related to the capital of the new English company, which was situate in England, if anywhere.

(o) Dicey, *Conflict of Laws* 749 (2nd ed.), note 8 omitted in later editions. As to the power to impose by imperial legislation duties of customs in colonies, see p. 462, *post*.

of the sale of immovables outside the United Kingdom if transmitted to the United Kingdom (p).

Death duties. In *Thomson v. Advocate-General* (q), a question was raised as to the effect of Schedule 3 of the Stamp Act, 1815, on personalty locally situate in Scotland and passing under the will of a British subject who died domiciled in British Guiana. The statute enacts that "every legacy given by any will of any person" shall be subject to legacy duty, and it was held that the words "any person" referred only to such persons as were at their death domiciled in England. "It is admitted," said the consulted Judges, "in all the decided cases, that the very general words of the statute, 'every legacy given by any will of any person,' must of necessity receive some limitation, and . . . we think such necessary limitation is that the statute does not extend to the will of any person who at the time of his death was domiciled out of Great Britain, whether the assets are locally situate in England or not." This view was adopted by the House of Lords (r).

In *Wallace v. Att.-Gen.* (s), the question was raised whether the decision in *Thomson's Case* (supra) applied to succession duty claimed on personal property in England consisting of a sum of Consols owned by a person domiciled in France. Section 2 of the Succession Duty Act, 1853, enacts that "every disposition of property by reason whereof any person becomes beneficially entitled to any property . . . shall be deemed to have conferred upon the person so entitled a succession," as to which he shall be liable to pay duty. "I think," said Lord Cranworth, "that in order to be brought within that section (2) he (the legatee) must be a person who becomes entitled by virtue of the laws of this country; any wider construction would give rise to difficulties hardly to be surmounted." "The soundness of this principle of construction has never been impugned, nor has the British Legislature thought fit to put any different limitation upon the terms on which legacy duty and succession duty are imposed" (t). These decisions have established a rule of construction that expressions relating to succession duty do not apply to movable property (other than chattels real) belonging to persons of foreign domicile, unless a clear intention is shown to tax by reference to the situation of property and not by the domicile of its owner (u).

In *Wallace v. Att.-Gen.* (supra) it was admitted that leaseholds forming part of a succession were not exempt from duty (*loc. cit.*, p. 2), for leaseholds are by the Act included in the definition of real property.

(p) *Ibid.*

(q) (1845), 12 Cl. & F. 1, 17, Tindal, C.J.

(r) See *Harding v. Queensland Commissioners of Stamps*, [1898] A. C. 769, 773.

(s) (1865), L. R. 1 Ch. App. 1, 7.

(t) *Harding v. Queensland Commissioners of Stamps*, supra, at p. 774.

(u) *Ib.*; and cf. *Re Smyth*, [1898] 1 Ch. 89 (interest of legatee held to be an English equitable chose in action) followed in *Att.-Gen. v. Johnson*, [1907] 2 K. B. 885; cf. *Lord Sudeley v. Att.-Gen.*, [1897] A. C. 11; and generally Hughes Parry, *Law of Succession* (1947), p. 319; Finance Act, 1946.

Estate Duty. The rules as to the statutes imposing legacy and succession duty apply also to the estate duty imposed by the Finance Act, 1894 (x), so far as concerns movable property situate outside the United Kingdom (y) on which legacy and succession duty would have been chargeable or not chargeable on grounds other than those of relationship of the legatee or successor to the *de cuius*. In *Att.-Gen. v. Jewish Colonisation Association* (z), a foreigner domiciled in Austria had made a disposition of property by deed to a company registered under English law for certain philanthropic objects. When the disposer died most of the securities disposed of were abroad. It was held that the doctrine *mobilia sequuntur personam* did not apply so as to create any presumption as to its locality, because he had parted with the legal estate in his lifetime and his beneficial interest ceased on his death: and Collins, L.J., said: "Whether, therefore, the test be that the appellants become entitled to the succession by virtue of English law, as stated by Lord Cranworth in *Wallace v. Att.-Gen.* (a), or that the intention that the property is to be brought under the protection of the English law must be gathered from all the circumstances, or, what is probably only another way of arriving at the same result, that the property in question must have an English character (as Lord Westbury called it in *Att.-Gen. v. Campbell* (b)) stamped upon it, I think the succession here falls within the Act as interpreted and limited by the decisions referred to in the argument."

Legacy and succession duties were abolished by the Finance Act, 1949 (12 & 13 Geo. 6, c. 47, s. 27). The new system established by that Act looks only to the amount to be taxed and not to its destination.

Probate duty. The law as to probate duty is different from that as to succession, probate duty being (by 55 Geo. 3, c. 184, s. 37, and Schedule, Part III) payable upon "the estate and effects" of the testator. The statute does not refer either to the person of the testator or his domicile; consequently, if the estate and effects are in foreign lands, probate duty is not payable upon them, though the testator may be domiciled in England (c); but if they are situate within the United Kingdom at the date of death, probate duty or the substituted estate duty is payable on this, even if the testator is domiciled abroad (d).

In *Blackwood v. R.* (e), it was decided that the expression "personal

(x) See s. 2 (2); *Att.-Gen. v. Jewish Colonisation Association*, [1900] 2 Q. B. 556; [1901] 1 Q. B. 123. As to the application of the Settled Land Act, 1882, to Eire and the effect of s. 22 (5) of that Act on liability for estate duty on the proceeds of the sale of settled land, cf. *Middleton (Earl) v. Cottesloe (Baron)*, [1949] A. C. 418.

(y) See Dicey: *Conflict of Laws* (6th ed.), 303—304 as to "situation" of property.

(z) [1901] 1 K. B. 123, affirming *S. C.*, [1900] 2 Q. B. 556, where many authorities are cited. Cf. *Ontario Treasurer v. Blonde*; *Same v. Aberdeen*, [1947] A. C. 24.

(a) L. R. 1 Ch. App. 1, 7, p. 423, *ante*.

(b) (1872) L. R. 5 H. L. 524.

(c) *Att.-Gen. v. Hope* (1834), 1 C. M. & R. 530, 552, *per Wigram, arguendo*. See also *Att.-Gen. v. Pratt* (1874), L. R. 9 Ex. 140, 143.

(d) *Commissioners of Stamps v. Hope*, [1891] A. C. 476; *Winans v. R.*, [1910] A. C. 27.

(e) (1883), 8 App. Cas. 82.

estate" in the New South Wales Stamp Duties Act, 1880, No. 3, s. 16, must be read as limited to such estate as the colonial grant of probate conferred jurisdiction to administer, *i.e.*, to *bona notabilia* within the colony as to which alone, by the Charter of Justice granted under 4 Geo. 4, c. 96, the Supreme Court of the colony could grant probate (*f*). In *Commissioners of Stamps v. Hope* (*g*), it was held that an asset, to be personal estate within an Act imposing probate duties, must exist within the local area of the probate jurisdiction, and that debts have an attribute of locality—in the case of simple contract debts, the local jurisdiction of the debtor; in specialty debts, the place where the specialty is when the creditor dies. In *Payne v. R.* (*h*), a debt which was a simple contract debt in Victoria, where both testator and debtor resided, was held to be an asset in Victoria recoverable under a Victorian probate, and liable to probate duty in Victoria, although the debt was created by statutory mortgages of land in New South Wales, and in that (former) colony was a specialty debt (*i*).

In *Winans v. R.* (*k*), foreign government and railway bonds payable to bearer and marketable on the London Stock Exchange, and physically situate in England at the date of the testator's death, were held liable to estate duty though the deceased was not domiciled in England. The principle of this decision is that domicile does not affect liability to probate duty or estate duty, except in the cases specified in the Finance Acts (*l*).

Income Tax. Under the Imperial Income Tax Acts many difficult questions have arisen with respect to the incidence of the tax as to whether the income sought to be charged accrues from a source within the United Kingdom, or is received (*m*) from abroad by a person residing in the United Kingdom, or accrues from a trade, etc., carried on in the United Kingdom.

In *Colquhoun v. Brooks* (*n*), the question arose whether a person resident in England was liable to pay income tax under the Income Tax Acts upon profits made by him in a business in Australia and not remitted to the United Kingdom. Lord Herschell said: "Notwithstanding the ingenious criticism to which they have been subjected . . . I think that, giving to the enactment its natural meaning, the facts stated do bring this case within it. It is urged, however, on behalf of the respondent that, if this construction be adopted, a foreigner

(*f*) See p. 473, *post*. On this case see *Kannreuther v. Geiselbrecht* (1884), 28 Ch. D. 175, 179, Pearson, J.

(*g*) [1891] A. C. 476, 481.

(*h*) [1902] A. C. 552.

(*i*) The Judicial Committee admitted that probate duty might also have to be paid in New South Wales before the mortgage could be discharged.

(*k*) [1910] A. C. 27.

(*l*) [1910] A. C., p. 35, Lord Atkinson; p. 38, Lord Gorell.

(*m*) See *Gresham Life Assurance Society v. Bishop*, [1902] A. C. 287; *Scottish Provident Institution v. Allan*, [1903] A. C. 129.

(*n*) (1889), 14 App. Cas. 493, 503, 511; cf. *Trinidad Lake Asphalt Operating Co. v. Trinidad and Tobago Income Tax Commissioners*, [1945] A. C. 1, 6, Lord Wright.

residing for a short time only in this country would be subjected to taxation here in respect of the whole of his business earnings in his own country or elsewhere, that so to tax him would be opposed to international comity, and that a construction which would involve such a consequence cannot be correct. I think the learned counsel for the respondent are right in saying that the result which they point out would follow in the case of a foreigner, but I do not feel satisfied that it would involve a violation of international law, and that the construction contended for by the Crown ought on that ground to be summarily rejected. Reliance was placed upon the decisions under the Legacy and Succession Duty Acts (*o*), which have imposed a limit upon the broad language of the enactments subjecting legacies and successions to taxation. But it must be remembered that it was necessary to put some limits on these general terms in order to bring the matters dealt with within our territorial jurisdiction. Without such a limitation the Legacy Duty Act, for example, would have been applicable although neither the testator nor the legatee, nor the property devised or bequeathed, was within or had any relation to the British dominions." Lord Macnaghten, dealing with the same aspect of the case, said: "Moreover, although the contention on the part of the Crown, if carried to its legitimate conclusion, would certainly lead to startling results in the case of a foreigner temporarily resident in this kingdom, I do not think that even those results are so plainly at variance with what is due to the comity of nations as to compel your lordships summarily to reject the contention without considering carefully what the Legislature has actually said." The decision was that a person resident in the United Kingdom and engaged in trade entirely carried on abroad is liable to British income tax in respect of so much only of the profits of that trade as are received in the United Kingdom (*p*).

In *San Paulo Brazilian Ry. v. Carter* (*q*), the case last cited was held not to apply to the case of a railway company "resident" in the United Kingdom, and carrying on its business partly in the United Kingdom and partly abroad (*r*). As the company's business was not carried on wholly outside the United Kingdom, it was held liable to execution on the full balance of profit, and not only on sums actually received in the United Kingdom.

In *Kodak, Ltd. v. Clark* (*s*), an English company which held the bulk of the shares in a foreign company was held not to be assessable

(*o*) *Ante*, p. 423.

(*p*) The case of *Colquhoun v. Brooks* was explained and distinguished in *Eaton & Turner v. McKenna*, [1937] A. C. 162, at p. 168, Lord Atkin, p. 172, Lord Thankerton.

(*q*) [1896] A. C. 31. Followed in *Goerz v. Bell*, [1904] 2 K. B. 136, as to a company registered abroad, but having its head office in London.

(*r*) As to colonial legislation on this subject, see *Scottish Provident Institution v. Commissioners of Taxes*, [1901] A. C. 340.

(*s*) [1903] 1 K. B. 505. Followed in *Gramophone and Typewriter, Ltd. v. Stanley*, [1908] 2 K. B. 89, as to a German company in which an English company held shares.

upon the full profits of the foreign company, in the absence of evidence that it controlled or interfered with the management of the foreign company, or that the foreign company was the agent of the English company. In *De Beers Consolidated Mines v. Howe* (1), it was held that a foreign corporation could be resident in the United Kingdom, and could there exercise its trade so as to become subject to the Income Tax Acts. The company in question was incorporated and registered in South Africa. The head office was at Kimberley, and it had an office in London with directors at each place, having, with certain limitations, equal authority; but the controlling majority of directors was in London (u).

Effect on the persons of foreigners within the realm.

3. *Foreigners while within this realm subject to our laws.* Foreigners have no absolute right to enter or remain in any State, and may be excluded or expelled by legislative authority (x), if not by the inherent authority of the State (y). It is recognised by the law of nations that a foreigner, so long as he is within the limits of a State, is in all respects subject to its laws (z). But this rule is more accurately described as one of municipal than of international law, since no sovereign State would tolerate any other rule (a). "The laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens" (b). Therefore, if a foreigner, while within England, offends against its laws, he is liable to be punished in the same way as if he were an Englishman.

Limits of realm. By the Territorial Waters Jurisdiction Act, 1878, it is declared and enacted in section 1, that "an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions [that is, by section 7, 'within one marine league of the coast measured from low-water mark'] is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested and punished accordingly." This statute was passed to

(1) [1905] 2 K. B. 612; [1906] A. C. 455.

(u) As to "residence" of corporations, see Dicey, *Conflict of Laws* (6th ed.), 126-128. *Egyptian Delta Land and Investment Co. v. Todd*, [1929] A. C. 1 (test of residence of company).

(x) *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272; *Att.-Gen. for Canada v. Cain & Gilhula*, [1906] A. C. 542; *Robtelves v. Brenan* (1906), 4 Australia, C. L. R. 395 (Kanakas); *Barcelo v. Electrolytic Zinc Co., etc., Ltd.* (1932), 48 Australian C. L. R. 391, 409; *Ex p. Lesiputtu* (1947), 47 N. S. W. S. R. 433, 435, citing Scott, L.J., in *R. v. Bottrill*, [1947] 1 K. B. 41, 51. Cf. Aliens Act, 1919, and Restrictions on Aliens Order (S. R. O. 1925, No. 760).

(y) See 6 Law Quarterly Review 272.

(z) See *De Jaeger v. Att.-Gen. of Natal*, [1907] A. C. 326.

(a) Diplomatic immunity is merely a personal and temporary privilege.

(b) Story: *Conflict of Laws* (8th ed.), s. 18; cf. Wharton, *Conflict of Laws* (2nd ed.), ch. xiii.

override the views of the majority of the Judges in *R. v. Keyn* (c), where the subject of the limits of the realm had been exhaustively discussed with great difference of judicial opinion, and to declare that the opinion of the minority was and always had been the law (d).

R. S. C. 1883, Ord. XI, defines the cases in which the English Courts are to exercise civil jurisdiction over persons or property not within England, and constitutes the present legislative limit of the civil jurisdiction of English Courts over foreigners abroad and British subjects in other parts of the Empire (e).

Resident foreigners entitled to privileges given by our laws. A foreigner resident in England is entitled to the protection of English law, including the right to sue in the English Courts for any wrong, whether committed in or out of England, provided that it was a wrong in the country where it was committed, whether a civil or a criminal remedy was there available (f), and that it does not involve a question as to the title of land abroad (g). "The right of all persons," said the Judicial Committee in *The Halley* (h), "whether British subjects or aliens, to sue for damages in English Courts in respect of torts committed in foreign countries has long since been established (i), and there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens, when such injuries are actionable both by the law of England and also by that of the country where they are committed" (k). So, also, a resident foreigner is entitled to avail himself of all privileges which may have been granted by statutory enactment just as though he were an Englishman. Brett, L.J., in *Boucicault v. Chatterton* (l), said, in dealing with an argument as to the meaning of the word "published" in s. 19 of the International Copyright Act, 1844: "If so, the word 'published' must have one meaning when applied to English authors and another meaning when applied to foreign authors under precisely similar

(c) (1876), 2 Ex. D. 63.

(d) See *R. v. Dudley* (1884), 14 Q. B. D. 281; and Merchant Shipping Act, 1894, ss. 686, 687; *Mortensen v. Peters* 1906, 43 Sc. L. R. 872; 8 Fraser (Justiciary), 93—where Lord Dunedin suggested that the terms of s. 6 and the Schedule of the Herring Fishery (Scotland) Act, 1889, were strong enough to indicate that Parliament considered the water specified as British even if not within the three-mile limit. The Court held that the Act and orders made thereunder prohibiting under penalties fishing in certain waters outside the three-mile limit applied to all persons, whether subjects or aliens, fishing contrary to the prohibition in the Moray Firth. This decision is admittedly inconsistent with international law, and is based on the view that Parliament meant to override its rules: Parl. Deb. (4th Ser.), vol. 169, p. 987. Cf. Clerk & Lindsell, Torts (10th ed.), chap. iv.

(e) See Dicey: Conflict of Laws (6th ed.), 180.

(f) *Machado v. Fontes*, [1897] 2 Q. B. 231; *Carr v. Francis Times & Co.*, [1902] A. C. 176, 182.

(g) Subject to the limitations imposed by R. S. C., Ord. XI; *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. Cf. *Re Hawthorne* (1883), 23 Ch. D. 743; *Deschamps v. Miller*, [1908] 1 Ch. 856.

(h) (1868), L. R. 2 P. C. 193, 202.

(i) See *Santos v. Illidge* (1860), 8 C. B. (N.S.) 861.

(k) See *Machado v. Fontes*, *supra*; Dicey, Conflict of Laws (6th ed.), 800 *et seq.*

(l) (1876), 5 Ch. D. 267, 280.

circumstances. That seems to me to be contrary to the common canon of the construction of statutes" (m). In *Jefferys v. Boosey* (n), a question arose as to the application of the Copyright Act, 1709, which enacted that "the author of any book . . . shall have the sole liberty of printing and reprinting such book for the term of fourteen years." As to the effect of this enactment upon foreigners resident in this country, Lord Cranworth said (o): "*Prima facie* the Legislature of this country must be taken to make laws for its own subjects exclusively, and where an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving the privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community for the general advantage of which the enactment is made. But when I say that the Legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here and composing and publishing a book here is an author within the meaning of the statute, and I go further—I think that if a foreigner, having composed, but not having published, a work abroad, were to come to this country and print and publish it here, he would be within the protection of the statute." And Lord Brougham in the same case said (p): "Generally we must assume that the Legislature confines its enactments to its own subjects over whom it has authority and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases and may, without express words, make it appear that such was the intendment of those provisions. But the presumption is rather against the extension and the proof of it rather on those who maintain such to be the meaning of the enactment." The Privy Council in *Macleod v. Att.-Gen. of N.S. W.* (q), adopted the opinion given by Parke, B., when advising the House of Lords in *Jefferys v. Boosey* (supra). He said (r): "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them, and when legislating for the benefit of persons must *prima facie* be considered to mean the benefit of those who owe obedience to our laws and whose interests the Legislature is under a correlative obligation to protect." On similar grounds it was held by the House of Lords in *Princess of Reuss v. Bos* (s), where the persons applying for the

(m) *Courtauld v. Legh* (1869), L. R. 4 Ex. 126, 130, Cleasby, B.

(n) (1854), 4 H. L. C. 815.

(o) *Ibid.* p. 955.

(p) *Ibid.* p. 970.

(q) [1891] A. C. 455, 458.

(r) (1854) 4 H. L. C. 815, at p. 926.

(s) (1871), L. R. 5 H. L. 176.

registration of a company were foreigners, that if a company at its outset contemplates some description of management and of business in this country, it comes within the provisions of the Companies Act, 1862 (r), and may be registered and afterwards wound up under that Act, although in substance all its operations may be abroad, and all the subscribers to the memorandum of association and all the directors are foreigners residing abroad. In this case the Court had to consider whether a statute conferred a benefit on an alien obtainable in England, not whether it purported to impose a burden on him in respect of acts done outside England. And from this point of view there is no inconsistency between *Jefferys v. Boosey* and *Routledge v. Low* (u).

Effect on foreigners abroad.

4. *British statutes not generally applicable.* It is sometimes said that a British Act inconsistent with international law has no validity, but a statute cannot be pronounced void as offending against international law, though Judges will endeavour if possible to incline to a construction which will avoid a breach of it (v). "The British Parliament," said the Judicial Committee, in *Lopez v. Burslem* (x), "certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown;" and Story regards it as "plain that the laws of one country can have no intrinsic force *proprio vigore* except within the territorial limits and jurisdiction of that country (y). They can bind only its own subjects and others who are within its jurisdictional limits, and the latter only while they remain therein; and whatever extra-territorial force they are to have is the result, not of any original power to extend them abroad, but of that respect which, from motives of public policy, other nations are disposed to yield to them, giving them effect, as the phrase is, *sub mutua vicissitudinis obtentu*, with a wise and liberal regard to common convenience and mutual benefits and necessities" (z). This proposition is not true in municipal law. There is indeed a presumption against any intention to frame a statute so as to contravene a rule of international law (a). In *Bloxam v. Favre* (b) a will made according to the forms of English law, but not according to the law of her domicile,

(r) Cf. now the Companies Act, 1948, ss. 406—423.

(u) See p. 433, *post*.

(v) Cf. p. 67, *ante*.

(x) (1843), 4 Moore P. C. 300, 305.

(y) The case of *Macnee v. Persian Investment Co.* (1890), 44 Ch. D. 306, is doubtful law. Chitty, J., there held that a company formed under English law to run a lottery in Persia could not be condemned as illegal within 9 Geo. 1, c. 19. See *Re International Securities Corporation, Ltd.*, (1908) 24 T. L. R. 837 (dealing in foreign lottery bonds held illegal and fraudulent).

(z) Conflict of Laws (8th ed.), s. 7; *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(a) See p. 67, *ante* and p. 435, *post*; Ilbert, p. 251; *Mortensen v. Peters*, 1906, 43 Sc. L. R. 872; 8 Fraser (Justiciary) 93.

(b) (1883), 8 P. D. 101, 104; (1884) 9 P. D. 130.

by a person who was domiciled abroad at the time of her death, though her domicile of origin was English, was held not to be entitled to probate in this country. And it was there said that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law," and that to allow such a will as this (which might perhaps have been pronounced invalid by the tribunals of the country where the alien in question died) to be proved in England would be acting contrary to this principle (c).

This is a presumption only, for each State can, at its own international risks, reject the opinions of other States as to international law. "It is all very well to say that international law is one and indivisible of which we take judicial notice but we cannot be ignorant of the fact that various civilized countries take different views of it and are we to say that the Scotch Court is wrong because it takes a different view of the application of international law than that which we should take? I think not. This part of the international law as recognised by the Scotch law becomes part of the Scotch law and to my mind at all events this Court is not at liberty to review international law so far as it becomes part of the Scotch law and which Scotch lawyers say is Scotch law" (d). From this it follows that when international law is administered by a municipal court of a country it is administered as part of the law of that country.

A subject of a foreign nation is under no obligation to comply with a British statute, except when resident in or passing through Great Britain itself, or some settlement or dependency of Great Britain where British law is in force, or while in British waters (e). In *Bulkeley v. Schutz* (f), the question was raised whether the Companies Act, 1862 (g), could bind "a foreign partnership actually complete

(c) On this question see Lord Kingsdown's Act, 1861, (24 & 25 Vict. c. 114); *Kirwan's Trusts* (1883), 25 Ch. D. 373, Kay, J.; *Hummel v. Hummel*, [1898] 1 Ch. 642. *Kirwan's Trusts* (power of appointment by will invalid as not in conformity with Wills Act, 1837) is open to criticism which applies also to *Hummel v. Hummel*. The former case was not followed in *Re Simpson*, [1916] 1 Ch. 502 and was disapproved in *Re Wilkinson's Settlement*, [1917] 1 Ch. 620. As to the effect of change of domicile on a will validly made before the change, see *Re Groos*, [1904] P. 273. The third section of the above Act is not limited to British subjects, *ib.* See also Dicey, *Conflict of Laws* (6th ed.), 822, 839.

(d) *Re Queensland Mercantile & Agency, Ltd.*, [1892] 1 Ch. 219, 226. *per* Lindley, L.J.

(e) In *The Indian Chief* (1801), 3 Rob. Adm. 12, 23, Lord Stowell said that in Eastern parts, if Europeans settle or found a mere factory, they are not admitted into the general body and mass of the society of the nation, but they are considered as taking their national character from that association under which they live and carry on their commerce. Consequently any European (though he be of a different nationality) who takes up his abode in such a settlement is considered as amenable to the laws of the particular European country from which the original settlers came. The Foreign Jurisdiction Acts are based on this theory. But see *Abd-ul-Messih v. Farra* (1884), 13 App. Cas. 431.

(f) (1871), L. R. 3 P. C. 764, 769. Cf. *Bateman v. Service* (1881), 6 App. Cas. 386.

(g) 25 & 26 Vict. c. 89; repealed and re-enacted in the Companies Act, 1948, s. 106. Part III of the Act extends to companies incorporated outside England which have a place of business in England.

and existing in a foreign country." The Judicial Committee were clearly of opinion that the Act never contemplated that such a partnership could be brought within the purview of the English Act of Parliament, the English Legislature having no power over the shareholders of such a company.

In *Re A. B. & Co. (h)*, Lindley, M.R., said on the question whether a foreigner resident abroad could be made a bankrupt in this country: "What authority or right had the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then of course the Court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle: that unless Parliament has conferred upon the Court that power in language which is unmistakable, the Court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments" (i).

In *Ex p. Blain (k)*, Brett, L.J., said: "I think the case comes within the well-recognised rule and that the respondents cannot be made subject to the English Bankruptcy Act being foreigners not domiciled here, and not present in this country; that they could not be made subject to the English bankruptcy law, unless they had committed an act of bankruptcy in England." And James, L.J., said: "The whole question is governed by the broad, general, universal principle, that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who, by coming to this country, whether for a long time or a short time, have made themselves during that time subject to English jurisdiction" (l). The Court of Appeal has recently held that a bankruptcy petition could be served on a Roumanian who had lived and carried on business here and had fled to Eire. He had sent his wife a power of attorney and she had sold his business here. It was held that as he had left debts unpaid here, he was carrying on business in England within s. 1 (1) (d) of the Act of 1914. And under s. 1 (2) of that Act a foreigner committed an Act of bankruptcy when he did any of the Acts set out in s. 1 (1). There was therefore jurisdiction to order service out of the jurisdiction. With regard to the decision in *Cooke v. Charles A. Vogeler Co. (h)* followed in *Re Debtors (i)*, Lord Greene, M.R., said as to the former, "the effect . . . appears to me to be now confined to the particular case of an assignment, which in order to be an Act of bankruptcy under paragraph (a) must be an assignment intended to operate by the laws of England and I add to that, whether the person executing it is a foreigner or not." The learned

(h) [1900] 1 Q. B. 541, 544. Affirmed *sub nom. Cooke v. Charles A. Vogeler Co.*, [1901] A. C. 102.

(i) [1936] 1 Ch. 622 (C. A.)

(k) (1879), 12 Ch. D. 522, 529, 526.

(l) See *Re Artola* (1890), 24 Q. B. D. 640.

Master of the Rolls thought nationality was not the test. As to the second case, he thought that Lord Wright, M.R., had felt himself bound by the decision in *Cooke's Case* (*supra*) (m).

In *Bremer v. Freeman* (n) the Judicial Committee said: "Their lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of death is the governing law (o), nor any that the statute 7 Will. 4 & 1 Vict. c. 26 (the Wills Act, 1837) applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law"; and wills validly executed according to the law of the foreign domicile are admitted to probate in England (p). In *Re Lorrillard* (q) a testator domiciled in New York died in England having assets there and in the United States. On a claim by the American administrator to the surplus English assets, the English Court was held to be justified in refusing to transfer the surplus assets. Warrington, L.J., said: "The principle is that the administration of the estate of a deceased person is governed by the *lex loci* and it is only when the administration is over that the law of his domicile comes in." It has been held in *Re Price* (r) that the provisions of sections 9, 10, of the Wills Act, 1837, as to the mode of exercising powers of appointment, have no application to the wills of persons not domiciled in England purporting to execute powers of appointment created by an English will (s).

But it would seem that, to dispose of realty or chattels real in England, the will must be validly executed and attested in accordance with English law (t); and it would also seem that the will of a foreigner who dies domiciled abroad is not subject to section 18 of the Wills Act, 1837, which relates to revocation of a will by the marriage of the testator (u).

Benefit of Acts may be taken by foreigners abroad. In *Jefferys v. Boosey* (x) a question arose whether the Copyright Act, 1710, referred to British authors only (that is, to authors resident in this country at the time of the publication of their works here) or to all authors of every nation. The House of Lords unanimously acted upon the opinion of the minority of the Judges who were present during the argument, and reversed the judgment of the Court below, holding

(m) *Re A Debtor*, [1949] L. J. R. 25, 33, 35, Lord Greene, M.R. Affirmed *sub nom.*: *Theophite v. Solicitor General*, [1950] A. C. 186, distinguishing the cases in [1901] A. C. 102 and [1936] 1 Ch. 622 *supra*.

(n) (1857), 10 Moore P. C. 306.

(o) Story: Conflict of Laws, s. 473; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

(p) *D'Huart v. Harkness* (1865), 34 Beav. 324, 328. In the goods of *Huber*, [1896] P. 209. *Re Simpson*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement*, [1917] 1 Ch. 620.

(q) [1922] 2 Ch. 638, 645, followed in *the Estate of Goenaga*, [1949] P. 367.

(r) [1900] 1 Ch. 442.

(s) Cf. *Barretto v. Young*, [1900] 2 Ch. 339; *Pouey v. Hordern*, [1900] 1 Ch. 492. *Re Pryce*, [1911] 2 Ch. 286, *Re Strong* (1925), 95 L. J. Ch. 22.

(t) *Pepin v. Bruyère*, [1900] 2 Ch. 504, [1902] 1 Ch. 24, adopting *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461, and rejecting *De Foggassieras v. Dupont* (1881), 11 L. R. Ir. 123.

(u) *Loustalan v. Loustalan*, [1900] P. 211, 233.

(x) (1854), 4 H. L. C. 815; see p. 174, *ante*.

that the Act of 1710 (8 Anne, c. 21), gave the benefit of copyright to British authors only. That Act was repealed by the Copyright Act, 1842, and in *Routledge v. Low* (y) the meaning of the word "author," as used in the later Act, was much discussed, although the real point at issue in the case did not depend upon the construction put upon that word. Lords Cairns and Westbury appear to have considered that the author of any book first published in England, no matter whether he was himself in England at the time of the publication or not, was entitled to the benefits of the English Copyright Act. "A British statute," said Lord Westbury, "must be considered as legislation for British subjects only unless there are special grounds for inferring that the statute was intended to have a wider operation. But by the common law of England, the alien friend, though remaining abroad, may acquire and hold in England all kinds of personal property and when a statute is passed which creates or gives peculiar protection to a particular kind of personal property and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property or being entitled to such protection?" The opinion of Lords Cairns and Westbury was adopted in *Falcon v. Famous Players Film Co.*, a case under the Copyright Act, 1911 (z).

In *Davidsson v. Hill* (a), it was held by Kennedy and Phillimore, JJ., that the Fatal Accidents Acts, which give a remedy to the representatives of a person killed by the negligence of another, enured in favour of the representatives of a foreign seaman killed on a foreign ship on the high seas by the negligence of a British ship. Kennedy, J., said: "It appears to me, under all the circumstances, and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and that certainly, as against an English wrongdoer, the foreigner has a right to maintain his action under the statutes in question" (b).

In *Tomalin v. S. Pearson & Son, Ltd.* (c) it was held that the Workmen's Compensation Act, 1906, has no application outside the territorial limits of the United Kingdom except in cases within section 7 (seamen and apprentices to the sea service). Cozens-Hardy, M.R., accepted the rule as laid down in Maxwell on Statutes (9th ed.), p. 149, viz., "that in the absence of an intention clearly expressed or to be inferred from its language or from the object or subject-matter or history of the enactment the presumption is that Parliament does

(y) (1868), L. R. 3 H. L. 100, 110, 118.

(z) [1926] 1 K. B. 393, 404, McCardie, J.; affirmed, [1926] 2 K. B. 474, 487, Bankes, L.J., 493, Scrutton, L.J.

(a) [1901] 2 K. B. 606, 614.; dissenting from *Adam v. British and Foreign S.S. Co.*, [1898] 2 Q. B. 430.

(b) Cf. *The Milford* (1858), Swabey 362, Dr. Lushington. As to the authority of this case, cf. per Phillimore, J., in *Poll v. Dambe*, [1901] 2 K. B. 579 at p. 586. In *The Bernina* (1888), 13 App. Cas. 1, the person killed was a foreigner, but the question was not raised.

(c) [1909] 2 K. B. 61.

not design its statutes to operate beyond the territorial limits of the United Kingdom."

Statutes purporting to affect foreigners abroad. Although the English law does not prevent a foreigner resident abroad from receiving benefit through the operation of a British statute, it must be accepted as a general rule, for purposes of construction, that "the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction, . . . no statute ought therefore to be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear" (d). If, however, "the Legislature of England in express terms applies its legislation to matters beyond its legislative (sic) capacity, an English Court must obey the English Legislature, however contrary to international comity such legislation may be" (e). And "if," as Cockburn, C.J., said in *R. v. Keyn* (f), "the Legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such an enactment, leaving it to the State to settle the question of international law with the Governments of other nations." In *Theophile v. Solicitor-General* (g), Lord Porter said: "Interpreted in accordance with its strict wording, the latter subsection [subsection (2) (c) of section 1 of the Bankruptcy Act, 1914] applies to British and foreign nationals alike, and, unless some principle to the contrary can be established I should so construe it. If I am right in this, an invocation of the comity of nations is irrelevant. If the meaning of an Act of Parliament is ambiguous, that doctrine may be prayed in aid, but where an English statute enacts a provision in plain terms, no such principle applies. Any foreign nation of which the person affected is a member, or with whom such person is domiciled, is free to disregard the provisions of the English enactment, but the person concerned cannot himself take exception though it may be he will escape from compliance with its terms because he is out of the jurisdiction and cannot be reached by English process." And in *The Amalia* (h) Dr. Lushington said: "I never said that, if it pleased the British Parliament to make laws as to foreigners out of the jurisdiction, Courts of justice must not execute them; indeed, I said the direct contrary" (i). And this result may also flow from necessary implication as well as from

(d) *The Amalia* (1863), 1 Moore P. C. (N.S.) 471, 474, Dr. Lushington; cf. *Re A. B. & Co.*, [1900] 1 Q. B. 541; affd. *sub nom. Cooke v. Charles A. Vogeler Co.*, [1901] A. C. 102; *Sirdar Gurdayal Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Re Debtors*, [1936] 1 Ch. 622. As to this case and *Cooke's Case*, see p. 432, ante, both were distinguished by the House of Lords in *Theophile v. Solicitor-General*, *infra*.

(e) *Niboyet v. Niboyet* (1879), 4 P. D. 1, 20, Brett, L.J.; and see Dicey: *Conflict of Laws* (6th ed.), 10.

(f) (1876), 2 Ex. D. 63, 160.

(g) [1950] A. C. 186, 195.

(h) *Supra* at p. 474.

(i) *See Mortensen v. Peters*, (1906) 43 Sc. L. R. 872; 8 Fraser (Justiciary) 93.

express enactment (k). Thus, the Merchant Shipping Act, 1854 (l), s. 267, enacted "that all offences committed at any place out of British dominions by any seaman, who at the time when the offence was committed, or *within three months previously*, had been employed in any British ship," shall be liable to be tried at the Central Criminal Court. In *R. v. Anderson* (m) an American serving on board a British ship was indicted at the Old Bailey for the murder of a sailor while the ship was in the river Garonne in France. It was objected for the prisoner that the Court had no jurisdiction to try him. It was ultimately decided that the Court had jurisdiction independently of the above enactment (n), and consequently it became unnecessary to decide what was its effect. "The difficulty," said Blackburn, J., "as to the statute legislating for those out of the scope of its authority we must deal with when it arises. As a general rule, no doubt, we should construe a British statute according to the principles of international law, and confine a legislative enactment to a British subject, or to a person subject to British protection" (o).

Presumption that property abroad of foreigners abroad not bound. Although British statutes sometimes purport to bind the persons of foreigners out of British jurisdiction (and, when they so purport, it is the clear duty of British Courts of law to execute and give effect to such statutes), it has been held otherwise with regard to the property of foreigners out of British jurisdiction. "It is quite clear," said Lord Westbury in *Att.-Gen. v. Campbell* (p) that "you cannot apply an English Act of Parliament to foreign property while it remains foreign property." This rule of law is "the natural consequence" of the proposition of international jurisprudence, that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory. . . . For it would be wholly incompatible with the quality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate . . . things not within its own territory. It would be equivalent to a declaration that the sovereignty over a territory was never exclusive in any nation, but only concurrent with that of all nations, that each could legislate for all. . . . The absurd results of such a state of things need not be dwelt on" (q).

This rule is so far true that British Courts refuse to act *in rem* against the property of foreigners abroad, and that the *forum rei sitæ* would disregard an English judgment *in rem* as made in violation of the ordinarily accepted rules of international comity, and that the

(k) *Ex p. Blain* (1879), 12 Ch. D. 522, 526, James, L.J., p. 432, *ante*.

(l) Repealed, but re-enacted as s. 687 of the Merchant Shipping Act, 1894; cf. s. 5 of the Commonwealth of Australia Constitution Act, 1900.

(m) (1868), L. R. 1 C. C. R. 161, 170.

(n) Not at common law, but under the Offences at Sea Act, 1536 (28 Hen. 8. c. 15).

(o) See *R. v. Dudley* (1884), 14 Q. B. D. 273, 284.

(p) (1872), L. R. 5 H. L. 524, 531.

(q) Story: *Conflict of Laws* (8th ed.), s. 20; cf. Wharton: *Conflict of Laws* (2nd ed.), ch. xiii.

judgments of a British Court against foreigners who have not been served with process within the jurisdiction, or who being abroad have not submitted to the jurisdiction of the Court, are recognised to be invalid (r). But for purposes of construction of statutes the rule is a presumption only.

Effect of British statutes on parts of United Kingdom other than England.

5. *Implication as to extent of British Acts.* *Prima facie* a British Act extends to the whole of the United Kingdom (s). "United Kingdom" in Acts passed and documents issued after April 12, 1927, means Great Britain and Northern Ireland (t), "Great Britain" includes Scotland but not Northern Ireland for the purposes of the Criminal Justice Act, 1948 (u), but the extent is often restricted by express words, and Acts containing no express words limiting their extent are often held inapplicable to the whole United Kingdom by reason of the phraseology used. In *Westminster Fire Office v. Glasgow Provident Investment Society* (v) Lord Watson supplied the true criterion when he said that the tenor of the enactment there in question (14 Geo. 3, c. 78, s. 83), and the remedies provided by it, indicated that they were not intended by the Legislature to apply to Scotland, or to be administered by the Scotch Courts. The rule is thus stated in a Scottish case (w): "Now, there are not words (in 35 & 36 Vict. c. 91), excluding Scotland from its provisions. Ireland is specially excluded, and the statute deals with interests which are the same on either side of the Border. The only reason for supposing that it was not meant to extend to Scotland is that it is drawn with such exclusive reference to English legislation and English institutions and procedure, that though it would be easy enough to find equivalents in our usages for these requisites, it would be difficult, if not impossible, to follow out in Scotland the precise injunctions of the Act. . . . I incline to the opinion that the statute applies to Scotland because its object is general, and there are no words to exclude and no reason for excluding Scotland from its operation, although I see great difficulties in the way of its practical application."

In the construction of statutes extending to Great Britain or the whole of the United Kingdom, decisions of the Scotch or Irish Courts on the statute are considered by, but are not treated as binding on, the English Courts (x). The comity of Courts is regarded as entitling

(r) *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; Dicey: Conflict of Laws (6th ed.), 325, 345.

(s) As to extent of Acts, see p. 53, *ante*.

(t) Royal and Parliamentary Titles Act, 1927, s. 2 (2).

(u) *R. v. Murphy* (1949), 65 T. L. R. 778, 779.

(v) (1888), 13 App. Cas. 699, 716.

(w) *Perth Water Commissioners v. McDonald* (1879), 6 Rettie (Sc.) 1050, at pp. 1055, 1056, Lord Moncreiff. Cf. as to Ireland, *R. v. Mallow Union Guardians*, (1859), 12 Ir. C. L. R. 116.

(x) See p. 17, *ante*.

concurrent decisions in Scotland or Ireland to respect but not to obedience, and it is for the House of Lords, as the *commune forum*, to settle (y) divergencies in the construction of Acts extending to the whole United Kingdom, as it is for the Judicial Committee to make uniform the construction of Acts applying to British possessions and protectorates. When a general Act uses terminology which has different senses in the legal systems of England and Scotland (z), the question arises whether the term is to be construed differently according as the question of construction arises in English or in the Scotch Courts, or, if not, what sense is to be given to the term to be construed.

In *R. v. Slator* (a), it was suggested that where terms of art are used which have a different meaning in England and Scotland, they are to be read in each country in the sense which they ordinarily bear there. But this suggestion must not be too implicitly followed, and the true rules as to the construction of terms used in statutes applying to more than one part of the United Kingdom are best stated in the words of Lord Macnaghten in *Income Tax Commissioners v. Pemsel* (b): "It seems to me that statutes which apply to Scotland as well as to England, and which touch upon matters commonly dealt with in legal language, may be divided into three classes. Sometimes, but very rarely, legal terms are carefully avoided, as in the Succession Duty Act. Sometimes in very recent statutes, as in the Bills of Exchange Act and the Partnership Act, every legal term according to English law is immediately followed by its equivalent in Scotch legal phraseology; and where no exact equivalent is to be found a neutral and non-legal expression is adopted. But in some cases certainly, and especially in the legislation of former days, the statute proclaims its origin and speaks the language of an English lawyer, with some Scotch legal phrases thrown in rather casually. The Income Tax Acts, I think, fall within this class, though no doubt the Act of 1842 is less conspicuously English than its predecessors. How are you to approach the construction of such statutes? We are not, I think, quite without a guide. It seems to me that there is much good sense in what Lord Hardwicke says in his well-known letter to an eminent Scotch Judge (c). Incidentally he happens to deal with the very point. He observes that where there are two countries with different systems of jurisprudence under one Legislature, the expressions in statutes

(y) The Railway and Canal Traffic Act, 1888, s. 17 (5), contained provisions for appeal to the House of Lords in case of divergence between the Supreme Courts of England, Scotland, or Ireland. The Railway and Canal Commission has now ceased to exist in relation to England and Scotland, and its powers are transferred to the High Court and the Court of Session; see Railway and Canal Commission (Abolition) Act, 1949.

(z) See *Re Wanzer, Ltd.*, [1891] 1 Ch. 305, as to the meaning of the term "sequestration" in s. 163 of the Companies Act, 1862, repealed and re-enacted in the Companies Act, 1948, ss. 227, 228.

(a) (1881), 8 Q. B. D. 267, 272.

(b) [1891] A. C. 531, at pp. 579, 580.

(c) See Lord Kames' *Elucidations*, p. 385 (edit. 1800), referred to in the report of *Lord Saltoun v. Advocate-General* (1860), 3 Macq. H. L. (Sc.) 659, 675, note (a).

applying to both are almost always taken from the language or style of one, and do not harmonise equally with the genius or terms of both systems of law. That was, perhaps, rather a delicate way of stating the case, but one must remember to whom Lord Hardwicke was writing and his meaning is perfectly clear. Then he explained how these statutes ought to be expounded. 'You must,' he says, 'as in other sciences, reason by analogy'—that is, as I understand it, you must take the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what Lord Hardwicke calls 'a consistent, sensible construction.' A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have unless it penetrates directly to the furthest part of the room. That was not Lord Hardwicke's view. He seems to have thought reflected light better than none."

The case of *Lord Saltoun v. Advocate-General* (d) referred to by several of the Law Lords in *Pemsel's Case* (supra) turned on the meaning to be attached in Scotland to the word "predecessor" in the Succession Duty Act of 1853. Lord Macnaghten further observed "In point of fact the question in *Lord Saltoun's Case* was not 'which of two meanings of a certain word was to be preferred but which of two persons was to be taken as fulfilling the conditions of the statutory definition of that word.'"

A taxing Act must, if possible, be so interpreted as to make the incidence of its taxation the same in all parts of the United Kingdom to which it applies. This rule was laid down in the House of Lords in *Lord Saltoun v. Advocate-General* (d) by Lord Campbell, and was adopted in *Income Tax Commissioners v. Pemsel* (e).

More recently on the meaning of "partnership", which differs in English and Scots law, Lord Simon, L.C., said: "In construing a taxing statute [the Income Tax Act, 1918] which applies to England and Scotland alike, it is desirable to adopt a construction of the statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities of taxation between citizens of the two countries" (f). From this a second rule has been deduced, that in such an Act the Court must assume that the words used by the Legislature are used in their popular signification. Lord Campbell in *Lord Saltoun's Case* (supra) said: "The technicalities of the laws of England and Scotland where they differ must be disregarded, and the language of the Legislature must be taken in its

(d) (1860), 3 Macq. H. L. (Sc.), 659, 671.

(e) *Supra*.

(f) *I. T. C. v. Gibbs*, [1942] A. C. 402, 414.

popular sense.” But the technicalities there in question were not technical expressions in the Act under consideration, but the technicalities in the law of real property outside the Act (g). And this rule is subordinate to those laid down by Lord Macnaghten (*supra*).

Effect of English Acts in Wales and Berwick. By section 3 of the Wales and Berwick Act, 1746, English and British statutes have effect in Wales and Berwick-on-Tweed, without express mention of either (h). No question has since that time arisen as to the effect of such Acts in those places. But occasionally mention is made of one or other or both, for purposes of inclusion or exclusion (i), and in recent Acts Wales is often named as a concession to the national sentiment of the Principality (k).

Effect of English Acts in Scotland. English statutes prior to the union with Scotland in 1707 have no effect in that country. British statutes passed between 1707 and 1800 presumably apply to Great Britain unless a contrary intention appears (l).

Where an Act contains a proviso that “nothing in this Act shall extend to Scotland,” or words to that effect, showing that the Act was intended only for some particular part of the kingdom, the effect of thus limiting its operation is to put the excluded part of the United Kingdom, so far as that Act is concerned, into the position of a foreign country. It was expressly provided that the Bankruptcy Act, 1869 (m), should not extend to Ireland; consequently, it was held in *Re O’Loghlen* (n) that a debtor summons taken out under the Act could not be served on any person unless he *bona fide* resided in England. Mellish, L.J., said: “In dealing with Acts of Parliament of this description which are intended only for particular parts of the United Kingdom the true principle of construction is that all things which are to be done must be done within the jurisdiction of the Court unless the Act expressly or by necessary implication enables them to be done elsewhere.” But a limitation of the operation of an Act to some particular part of the kingdom will not necessarily make the Act wholly inoperative with regard to all things relating or belonging to the excluded part. Thus, in *R. v. Brackenridge* (o), it was contended that the Forgery Act, 1861, which by section 55 enacts that “nothing in this Act shall extend to Scotland except as otherwise hereinbefore expressly provided,” did not extend to the offence of forging Scottish

(g) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 532, 578, Lord Macnaghten quoted above; and see *Earl of Buchan v. Lord Advocate*, [1909] A. C. 166, 190, Lord Loreburn, L.C. That case was also on the Succession Duty Act, 1853.

(h) See 1 Bl. Comm. 93–99.

(i) See 11 & 12 Vict. c. 42, s. 32; 6 & 7 Will. 4, c. 103.

(k) See Interpretation Act, 1889, ss. 13, 16 (1), (2), 23 (a), *post*, Appendix B.

(l) In *Fordyce v. Bridges* (1847), 1 H. L. C. 1, a question was raised as to whether 4 & 5 Will. 4, c. 22, applies to Scotland, but no general principles were discussed.

(m) 32 & 33 Vict. c. 71; repealed by the Bankruptcy Act, 1883. See Bankruptcy Act, 1914, as amended by Bankruptcy (Amendment) Act, 1926, which by s. 169 does not extend to Scotland or Ireland except as expressly provided.

(n) (1871), L. R. 6 Ch. App. 406, 411.

(o) (1868), L. R. 1 C. C. R. 133.

bank-notes. But the Court held that it did, and that the effect of the above-mentioned words was merely to exclude from the operation of the Act offences committed and punishable in Scotland. So in *R. v. Lightfoot* (p), it was contended that a summons issued in England against the putative father of a bastard child could not be served on the father in Scotland, where he had gone to reside, as the Poor Law Act, 1844, was a statute extending only to England. As to this argument, Lord Campbell said: "Section 75 is evidently intended merely to prevent the Act from having a general operation over the United Kingdom with regard to 'the laws relating to the poor,' and can have nothing to do with the incidents of a proceeding before English petty sessions as to the maintenance of a bastard born in England" (q). In an action brought in the Scottish Courts by a widow in respect of a fatal accident to her husband in England, the Court held that her rights fell to be determined by the *lex fori delicti*, i.e., the law of England, which excluded the claim for solatium (unknown to the English law), and which could therefore not be admitted by the *lex fori*. There was thus no title in the widow as her husband's executrix to claim in Scotland (r).

Effect of English Acts in Ireland. From the conquest of Ireland by Henry II until the passing of Poyning's law (10 Hen. 7), Ireland legislated for itself, and English statutes had no force there (s). From 1495 till 1719, no English or British Act applied to Ireland unless it was specially named or included. In that year (6 Geo. 1, c. 5) the British Legislature asserted the right to make laws for Ireland. This claim was abandoned in 1782 (22 Geo. 3, c. 53), and the Irish Legislature became independent from the British. So matters stood until the Union in 1800 and "since the Union all Acts of Parliament extend to Ireland, whether expressly mentioned or not, unless that portion of the United Kingdom be expressly excepted, or the intention to except it is otherwise plainly shown" (t). This state of affairs existed till the legislation of 1922 which created the Irish Free State (or Eire) (u).

But the Act of Union did not extend to Ireland any English or British Act passed before 1800 which did not previously apply to Ireland. "If," said the Court in *Lane v. Bennett* (x), "the expression 'beyond the seas' in 4 & 5 Anne, c. 3 (1705) (y), is to be construed as equivalent to 'out of the realm of England' [as we think it is], then the Act of Union does not bring Ireland within that realm or make

(p) (1856), 6 E. & B. 822, 829.

(q) Cf. *Berkley v. Thomson* (1884), 10 App. Cas. 45.

(r) *M'Elroy v. M'Allister*, [1949] S. C. 110.

(s) See 1 Bl. Comm. 103.

(t) 1 Steph. Comm. 101. See *R. v. Mallow* (1859), 12 Ir. C. L. R. 35.

(u) See pp. 442-443, *post*. By the constitution of 1937 Eire is declared to be a sovereign, independent, democratic State and by the repeal of the External Relations Act, in 1948, has now severed all connection with the British Crown and Commonwealth.

(x) (1836), 1 M. & W. 70, 75.

(y) 4 Anne, c. 16 (Ruffhead).

it parcel thereof, but it forms one United Kingdom of both, and provides that all the laws then in force in each shall remain as by law established in each. Anyone, therefore, in Ireland is still out of that which was the realm contemplated by the statute of Anne, although England has ceased to be a separate kingdom," and various statutes, such as the Life Assurance Act, 1774, have been extended to Ireland by express enactment (z).

Territorial effect of Irish statutes passed before the Union. As regards the territorial effect of Irish statutes before the Union, it has held been that an Irish statute of 19 Geo. 2, enacting that any future marriage between a Papist and a Protestant, or between two Protestants, if celebrated by a Papist priest, should be void, was not extra-territorial in its operation and did not while in force affect a marriage between a domiciled Irish Protestant and a foreign Roman Catholic celebrated in a foreign country (a).

Subject to the provisions of the Irish Free State Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) on December 6, 1922, continued to be of full force and effect until the same or any of them have been repealed or amended by the Oireachtas (b).

Under the provisions of the Statute of Westminster, 1931, no statute of the United Kingdom passed after December 11, 1931, extends to the Irish Free State, unless it is expressly declared in the statute that it has requested and consented to the enactment (c). The right of appeal to His Majesty in Council has been validly abolished under the Statute of Westminster (d).

Operation of U.K. statutes in Ireland since 1922. By virtue of the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922, the Irish Free State was given the same constitutional status as the Dominion of Canada, and after 1922 it was usual to exclude from the territorial operation of statutes of the Parliament of the United Kingdom "any part of Ireland other than Northern Ireland." The same result is attained by providing that "United Kingdom," unless the context otherwise requires, is to mean Great Britain and Northern Ireland (e). The expression "Northern Ireland" was defined by the Government of Ireland Act, 1920, "for the purposes of that Act," and presumably has the same meaning in later Acts of Parliament. Power was expressly reserved to the

(z) By the Life Insurance (Ireland) Act, 1860. See *Griffiths v. Fleming*, [1909] 1 K. B. 805.

(a) *Swift v. Att.-Gen. for Ireland*, [1912] A. C. 276.

(b) Article 73 of the Constitution of the Irish Free State (Saorstát Eireann). See *Wakely v. Triumph Cycle Co., Ltd.*, [1924] 1 K. B. 214 (C. A.) (Judgments Extension Act, 1868, not in force); *Gieves v. O'Connor*, [1924] 2 Ir. R. 182 (Judgments Extension Act, 1868, in force); *Performing Right Society v. Bray Urban District Council*, [1930] A. C. 377 (Copyright Act, 1911); and *Irish Free State (Kennedy) v. Little*, [1931] Ir. R. 39 (Fugitive Offenders Act, 1881).

(c) The Statute of Westminster (22 & 23 Geo. 5, c. 4, s. 4), Appendix C.

(d) *Moore v. Att.-Gen. for Irish Free State*, [1935] A. C. 484.

(e) The Royal and Parliamentary Titles Act, 1927, s. 2 (2).

Parliament of the United Kingdom to legislate for the Irish Free State (*f*) in any case where in accordance with constitutional practice, that Parliament could make laws affecting other self-governing Dominions, a power which must now be read subject to the provisions of section 4 of the Statute of Westminster, 1931 (see Appendix C).

By section 4 of the Government of Ireland Act, 1920, as amended by the Irish Free State (Agreement) Act, 1922, the Parliament of Northern Ireland has limited power to make laws for the peace, order and good government of Northern Ireland in respect of matters exclusively relating to that part of Ireland. It is expressly provided that the Northern Parliament shall not have power to make laws in respect of a number of specific matters and that any law made in contravention of the limitations imposed by that section shall so far as it contravenes those limitations be void.

Ireland was henceforth known as Eire, from the new constitution enacted by the people in 1937 and recognised by the Eire (Confirmation of Agreements) Act of 1938 whereby the State was declared to be a sovereign, independent and democratic State (*g*). Eire dissolved the last connection with the United Kingdom as a Dominion by repealing the Executive Authority (External Relations) Act, 1936, in 1948 by the Republic of Ireland Act, 1948 (No. 22 of 1948). Ireland was henceforth a country outside the British Commonwealth of Nations. She was however accorded a unique position vis-a-vis the United Kingdom. The Ireland Act, 1949 (12 & 13 Geo. 5, c. 41) declares that from April 18, 1949, Ireland is an independent republic, but by s. 2 (1) the Republic of Ireland is declared not to be a foreign country and its chief representative and his staff were to have the same privileges as High Commissioners and Agents. This Act does not affect the provisions of the British Nationality Act, 1948, s. 2, with regard to citizens of Eire, whose nationality is likewise provided for in section 5 of the Act of 1949.

Northern Ireland is expressly stated in s. 1 (2) of the Act of 1949 to remain part of His Majesty's Dominions and shall in no event cease to be so without the consent of its own Parliament.

There is a presumption that an Act of Parliament will not operate beyond the United Kingdom (*h*). The Isle of Man and the Channel Islands are not colonies, but are included in the definition given in section 18 (1) of the Interpretation Act, 1889 (*i*), of the "British Islands."

Isle of Man. The Isle of Man (*k*) is subject to the British Legislature,

(*f*) By s. 4 of the Irish Free State Constitution Act, 1922.

(*g*) *Murray v. Parkes*, [1942] 2 K. B. 123: "Not at any time . . . has it ever been declared in terms by the government of Eire that the so-called right to secede has in fact been exercised." Lord Caldecote, C.J., at p. 128.

(*h*) Ilbert: *Legislative Methods and Forms* 251.

(*i*) *Post*, Appendix B.

(*k*) Purchased in 1765 (5 Geo. 3, c. 26).

but British statutes do not extend to the island unless it is specially named (*l*).

Channel Islands. As regards the Channel Islands, there is still some doubt whether an Act of Parliament becomes there, of its own force, a binding law (*m*). Where an enactment is meant to extend to the Channel Islands, it is usual (*n*), but not invariable (*o*), nor it would seem essential, to insert the following clause: "The Royal Courts of the Channel Islands shall register this Act," or a clause authorising the King in Council to make an order applying the Act to the islands, and requiring its registration there (*p*). Imperial Acts affecting the Channel Islands include the following subjects:—customs (*n*), Army and Air Force, extradition, savings banks (*n*), sea fisheries; telegraphs; air navigation and carriage by air; copyright; merchant shipping; marriage facilities (the Acts of 1915 and 1916 were applied to Guernsey and Jersey by Orders in Council). Some others of the above statutes were applied to the Channel Islands by Orders in Council.

Dominions, Colonies, and formerly India, affected by British statutes.

6. The legislation applicable to a British possession falls into three classes:

1. Imperial statutes expressly or by necessary implication extending to the possession;
2. (a) English or British or United Kingdom statutes (*q*) extended to the possession as part of the personal law of the first settlers; or
(b) Legislation of foreign States in force in the possession on its conquest or cession; and
3. Acts, ordinances, or other forms of legislation of the possession, enacting new laws, or adopting English or British or United Kingdom Acts with or without modification (*r*).

Theoretically, the British Parliament can legislate for the whole

(*l*) See 1 Bl. Comm. 105, 106; Anson, *Law and Custom of the Constitution* (4th ed.), vol. ii, pt. ii, 54. For an example of an Act applying to the Isle of Man see the Summer Time Act, 1922.

(*m*) Jenkyns: *British Rule and Jurisdiction Beyond the Seas*, chap. iii, p. 37; Anson, *l. c.*, 57; Keith, *Governments of British Empire* (1935), p. 368.

(*n*) See Customs Consolidation Act, 1876, s. 289; Savings Banks Act, 1891, s. 17.

(*o*) See Penal Servitude Act, 1891, s. 10; Post Office Act, 1908, s. 88; Summer Time Act, 1922.

(*p*) The practice of registration seems to have been derived from the same source as the claim of French Parliaments, which led to constitutional disputes in the reign of Louis XVI. A similar practice existed in French colonies: *Du Boulay v. Du Boulay* (1869), L. R. 2 P. C. 430. It is a moot question whether registration can be required if the order is not made with the concurrence of the island States: *Re States of Jersey* (1853), 9 Moore P. C. 185; *Re Jersey Prison Board*, 8 St. Tr. (N.S.) 286, 1147; Jenkyns, *l. c.*, 37, 38; Anson, *l. c.*, 54–61.

(*q*) The statutes of Scotland and Ireland do not bind any colony. Nova Scotia (now a Province of the Dominion of Canada) was under the English common law as it stood at the date of its complete acquisition: see *North American Life Insurance Co. v. Craigen* (1886), 13 Canada 278, 292.

(*r*) This last head is dealt with in chap. ix, *post*.

Empire. But it is never presumed to legislate except for the United Kingdom, unless apt words are inserted in the Act.

No Act of Parliament of the United Kingdom passed after December 11, 1931, extends to Canada (including Newfoundland (s)). South Africa, India, Pakistan or Ceylon unless it is expressly declared in the Act that that Dominion has requested and consented to the enactment thereof (t). Australia has not adopted the section of the statute creating the exemption. New Zealand in 1947 enacted the Statute of Westminster Adoption Act. Previously Parliament at the request and with the consent of that Dominion had enacted the New Zealand Constitution (Amendment) Act, 1947, which enabled the Dominion Act to be passed.

The term "British possession" used above means any part of the King's dominions, except the United Kingdom (u), and is therefore wide enough to include the Isle of Man and the Channel Islands (x).

Up to December 11, 1931, the term "colony" meant any part of the King's dominions, except the British Islands and British India (y).

In Acts passed after December 11, 1931, "colony" does not include a Dominion *i.e.*, Canada, (including Newfoundland) (s), Australia, New Zealand, South Africa, the Irish Free State (until 1948), Ceylon (since February 4, 1948), India and Pakistan, or any Province or State forming part of a Dominion (z). Burma formed part of British India until April 1, 1937, when it was administered separately. On January 6, 1948, Burma became an independent state outside the British Commonwealth by virtue of the Burma Independence Act, 1947.

The term "British India" meant all territories which were for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces of India (a).

In *New Zealand Loan, &c., Co. v. Morrison* (b), the question arose whether the Joint Stock Companies Arrangement Act, 1870 (c), which purported to extend to all creditors, applied to creditors in the Colony of Victoria. Lord Davey said: "Their lordships do not think that the Arrangement Act of 1870, when read by itself and detached from the

(s) Responsible government was granted to Newfoundland in 1855. Owing to financial difficulties a commission of government was appointed, and had held office since 1934. In December, 1948, the Dominion became a Province of Canada, and on March 23, 1949, an Act of Parliament, 12 & 13 Geo. 6, c. 22, was passed at the request and with the consent of Canada to confirm and give effect to the terms of the union.

(t) The Statute of Westminster, 1931, s. 4. The Irish Free State is now excluded as being a foreign independent republic, *see* p. 443, *ante*.

(u) Interpretation Act, 1889, s. 18 (2), *post*, Appendix B.

(x) *Ibid.*, s. 18 (1), *post*, Appendix B.

(y) *Ibid.*, s. 18 (3), *post*, Appendix B.

(z) The Statute of Westminster, 1931, s. 11.

(a) For definition of "India" *see* the Government of India Act, 1935, s. 311 (1); *see* pp. 475 *et seq.*, *post*.

(b) [1898] A. C. 349, 357.

(c) Repealed and re-enacted in the Companies (Consolidation) Act, 1908. *See* now the Companies Act, 1948, Part V.

other Companies Acts, does, either by express words or by necessary implication, extend to the colonies. That Act, however, cannot be regarded by itself, but as only one of a collection of Acts together containing the statutory law relating to Joint Stock Companies in the United Kingdom, which are compendiously referred to as the Companies Acts and ordered to be read together. It is impossible to contend that the Companies Acts as a whole extend to the colonies or are intended to bind the colonies. The Colonial Courts possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject." And in the result it was held that the Act applied only to creditors whose rights were in question in Courts of the United Kingdom (d).

Imperial Acts extending to colonies. Imperial Acts extending to British possessions are of two kinds:

- (a) Acts applying to particular possessions or groups of possessions; and
- (b) Acts extending to all possessions.

(a) To the first class belong the British North America Act, 1867, and the Acts amending it, the Australian Commonwealth Act, 1900, the South Africa Act, 1909, the New Zealand Constitution (Amendment) Act, 1947, the Burma Independence Act, 1947, the Ceylon Independence Act, 1947, and the Constitution Acts establishing responsible government in many British possessions (e).

No legal question can arise as to the validity of any of these Acts, nor as to the legal competence of the Imperial Legislature to amend or alter them (f); but legislation by Parliament in respect to those Dominions which have adopted the Statute of Westminster, is restricted by that Act (see p. 445, *ante*). For instance, by the British North America Act, 1867, ss. 91, 92, 101, and the Statute of Westminster, 1931, s. 4, it is within the power of the Canadian Parliament to enact that appeals to the Privy Council shall be excluded and that the jurisdiction of the Supreme Court shall be ultimate (g).

(b) Acts which extend to all the King's dominions, override the inconsistent provisions of every prior Act (imperial or colonial) relating to any British possession. This is a clear constitutional rule, and has been recognised in Canadian decisions (h). Every subsequent Colonial Act which is repugnant to an Imperial Act extending to the

(d) As to Bankruptcy Acts, see p. 448, *post*.

(e) *E.g.*, Southern Rhodesia.

(f) *Vide ante*, p. 66; Broom: Const. Law, pp. 120, 126, 191; 1 Steph. Comm. 125; Todd: Parl. Govt. in Colonies, ch. iv; *Routledge v. Low* (1868), L. R. 3 H. L. 100. See Keith's Governments of the British Empire (1935), p. 30.

(g) *Att.-Gen. of Ontario v. Att.-Gen. of Canada (Att.-Gen. of Quebec intervening)*, [1947] A. C. 127.

(h) *R. v. College of Physicians and Surgeons* (1879), 44 Upp. Can. Q. B. 564, on the Medical Act, 1858.

colony, or to any Order in Council or regulation made under the Act, or having in the colony the effect of the Act, is void and inoperative to the extent of the repugnancy (i), but this provision does not now bind a Dominion (k).

Very few modern Acts extend to the whole of the Empire, and it is now usual to insert in Acts of this class a suspensory clause, enabling the Imperial Government to suspend the operation in a colony of an Imperial Act, so long as a satisfactory equivalent for its terms is provided by the colonial Legislature (l).

In the case of Merchant Shipping and Admiralty jurisdiction, and the Foreign Enlistment, Fugitive Offenders, and Extradition Acts the intervention of the Imperial Legislature is essential, the colonies only having such powers of extra-territorial legislation as are expressly conferred by their Constitution Acts or other imperial legislation. The Parliaments of Canada, South Africa and New Zealand, Ceylon, India and Pakistan, have, however, full power to make laws having extra-territorial operation (m).

In the case of an Imperial Act it would seem that the decisions of the Courts of the United Kingdom (even if not of the last resort), though not strictly binding on the colonial Courts, should be followed by them. "An Act of a Colonial Legislature where the English law prevails must be governed by the same rules of construction as prevail in England, and English authorities upon an Act *in pari materia* are authorities for the interpretation of the Colonial Act" (n). In *Nadarajan Chettiar v. Walauwa Mahatmee* (o) a case on sec. 2 (1) and (2) of the Ceylon Moneylending Ordinance, 1918, it appeared that this section reproduced sec. 1 of the Moneylenders Act, 1900. Following the decision of James, L.J., in *Ex p. Campbell* (p), and of the House of Lords in *Trimble v. Hill* (n), the Privy Council held that "the Courts of Ceylon acted correctly in following the decision of the English Court of Appeal." In the case of a Dominion or Colonial taxing statute, however, it may be otherwise. In *Armstrong v. Estate Duty Commissioners* (q), Lord Maugham said: "It is well settled that in interpreting

(i) 28 & 29 Vict. c. 63, s. 2, p. 448, *post*.

(k) The Statute of Westminster, 1931, s. 2 (2).

(l) E.g., Foreign Enlistment Act, 1870; Extradition Acts, 1870, 1873, 1895 and 1906; Fugitive Offenders Act, 1881; and Official Secrets Act, 1889. For list of such Acts, see Tarring, *Law of the Colonies* (4th ed.). As to the mode of proving the application of the Foreign Enlistment Act, 1870, to a foreign possession of the Crown, see *R. v. Jameson*, [1896] 2 Q. B. 425, 429.

(m) The Statute of Westminster, 1931, s. 3. As to the Irish Free State, see now p. 443 *ante*.

(n) See *per* Dr. Lushington in *Catterall v. Sweetman* (1845), 9 Jur. 951, 954, approved by P. C. in *Trimble v. Hill* (1879), L. R. 5 App. Cas. 342, 344; *City Bank v. Barrow* (1880), 5 App. Cas. 664, 673, Lord Selborne, L.C. Contrast *Grand Trunk Rail. Co. v. Washington*, [1899] A. C. 275, 280. This view has been accepted in Canada: *Paradis v. R.* (1887), 1 Can. Ex. 191; *McPherson v. R.* (1882), 1 Can. Ex. 53.

(o) (1950), 66 T. L. R. (part 2) 15 at pp. 19, 20.

(p) (1870), L. R. 5 Ch. App. 703, 706 (see p. 133, *ante*).

(q) [1937] A. C. 885 at p. 896. Cf. *Att.-Gen. for Ontario v. Perry*, [1934] A. C. 477, 487, *per* Lord Blanesburgh.

a taxing statute of a Dominion or Colony, which contains on its face no reference to its origin or previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken or to rely on decisions as to the true interpretation in the Courts of Great Britain of those terms or sections."

The English Bankruptcy Act, 1869 (r), applied, *sub modo*, to all the King's dominions (s), and the Bankruptcy Act, 1914, seems to apply to land in any part of the King's dominions (t). In *Callender Sykes & Co. v. Colonial Secretary of Lagos and Davies* (u), the Judicial Committee said: "The Supreme Court lays down the principle that an Imperial Act does not apply to a colony unless it be expressly so stated or necessarily implied. They point out that there is no case deciding that land in a colony passes under section 17 (of the Bankruptcy Act, 1869), and they dwell on the inconveniences which would arise from conflicts of law if an English statute were to transfer land beyond the limits of the United Kingdom. On these grounds they hold that under the word 'property' (in section 17) land in Lagos does not pass to the trustee in bankruptcy. Upon this reasoning their lordships have to remark that there is no question here of any conflict between English and foreign law. Lagos was not in 1869, and is not now, a foreign country. How far the Imperial Parliament should pass laws framed to operate directly in the colonies is a question of policy, more or less delicate, according to circumstances. No doubt it has been suggested that if such laws are passed they must be held valid in colonial Courts of law (x). It is true that the laws of every country must prevail with respect to the land situated there. If the laws of a colony are such as would not admit of a transfer of land by a mere vesting order or mere appointment of a trustee, questions may arise which must be settled according to the circumstances of each case. Such questions are specially likely to arise in those colonies to which the Imperial Legislature has delegated the power of making laws for themselves, and in which laws have been made with reference to bankruptcy." The Judicial Committee went on to say: "If a consideration of the scope and object of a statute leads to the conclusion that the Legislature intends to affect a colony, and the words used are calculated to have that effect, they should be so construed. It has been pointed out above that some sections of the statute clearly bind the colonies in words which do not necessarily, but which may, apply

(r) 32 & 33 Vict. c. 71, repealed by Bankruptcy Act, 1883. See Bankruptcy Act, 1914.

(s) Williams on Bankruptcy (16th ed.), pp. 1-3.

(t) The Bankruptcy Act, 1914, ss. 53 (4), 122, 123 and 167. See Westlake, *Private International Law* (1925), p. 178; Foote, *Private International Law* (5th ed.), 265, and Williams on Bankruptcy (16th ed.), pp. 397, 541, 543.

(u) [1891] A. C. 460, at p. 465.

(x) See *R. v. College of Physicians and Surgeons* (1879), 44 Upper Canada Q. B. 564, on the Medical Act, 1858.

to land. By the Bankruptcy Act of 1849, s. 142, all lands of the bankrupt 'in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to her Majesty, are to vest in his assignees.' By section 168 of the Bankruptcy Act of 1883 the property which is passed to the trustee includes 'land, whether situate in England or elsewhere.' The Scotch Act of Bankruptcy, passed in 1856, s. 102, vests in the trustee the bankrupt's 'real estate situate in England, Ireland, or in any of her Majesty's dominions.' The Irish Act of Bankruptcy, passed in 1857, s. 268, vests in the bankrupt's trustee all his land, 'wheresoever situate.' No reason can be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scotch and Irish Acts and in the English Acts immediately preceding and immediately succeeding. It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law wherever the Imperial Parliament had the power to apply it and their lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony" (y). They therefore held that an adjudication under the Act of 1869 operated to vest in the trustee the bankrupt's title to real estate in Lagos subject to any requirements prescribed by the local law as to conditions necessary to effect a transfer of realty there situate.

Planted Colonies. *Prima facie* the common (z) and statute law of England as it was at the time of the plantation of the colony, extends to every British colony (including the United States of North America) which was colonised without conquest or cession from a civilised power. In the absence of special provision it is deemed to have been planted with the settlers as their personal law. The question whether a given English or British Act extends to a colony is not in truth a question of construction, but of history. The answer, in the absence of specific provisions by charter (a) or proclamation (b) or legislation, depends not upon anything in the terms of the Act itself, but upon the opinions of the Judges as to whether the Act is one which in its nature could be treated as forming part of the body of law which Englishmen

(y) See *Ex p. Rogers* (1881), 16 Ch. D. 665, 666, Jessel, M.R. As to the rule to be followed here in the case of a "foreign" bankruptcy cf. *Re Nelson*, [1918] 1 K. B. 459, 478, Eve, J., and *Re Anderson*, [1911] 1 K. B. 896, followed in *Re Craig* (1916), 86 L. J. Ch. 62.

(z) See p. 452 note (n), *post*.

(a) *Freeman v. Fairlie* (1828), 1 Moore Ind. App. 305, 324. The expression "common law" probably does not include what is called the common law of Parliament. See *Chanter v. Blackwood* (1904), 1 Australian C. L. R. 39, 57, Griffith, C.J., referring to Forsyth, Cases and Opinions on Constitutional Law, p. 25, opinion of Cockburn and Bethell, and to *Kielley v. Carson* (1843), 4 Moore P. C. 84. It does not include ecclesiastical law: *Re Bishop of Natal* (1864), 3 Moore P. C. (n.s.) 148.

(b) In the case of British Columbia, see *Watts v. Watts*, [1908] A. C. 573, where the Proclamation of November 19, 1858, was held to apply to that province of Canada the Matrimonial Causes Act, 1857.

would carry with them into a new country (c). For an Act passed prior to the formation of a colony to run in the colony without express words, the Act must be applicable to the circumstances of the colony (d), or be adopted by colonial Act or ordinance (e), or applied by royal charter (f).

The law on this subject is thus summed up by Lord Watson in *Cooper v. Stuart* (g): "The extent to which English law is introduced into a British colony and the manner of its introduction must necessarily vary according to circumstances. There is a great difference between a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consists of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class. In case of such a colony the Crown may by ordinance, and the Imperial Parliament or its own Legislature, when it comes to possess one, may by statute declare what part of the common and statute law of England shall have effect within its limits. But when that is not done the law of England must (subject to well-established exceptions) become from the outset the law of the colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the colony, the law of England must prevail until it is abrogated or modified either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm. 107; appear to their lordships to have a direct bearing upon the present case. He says: 'It hath been held that if an uninhabited country be discovered and planted by English subjects, all the laws then in being which are the birthright of every English subject are immediately there in force (Salk. 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people—the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the Established Church, the jurisdiction of spiritual courts (h) and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and

(c) *Forbes v. Cochrane* (1824), 2 B. & C. 448, 463, Holroyd, J.

(d) *Whicker v. Hume* (1858), 1 De G. M. & G. 506; 7 H. L. C. 124; see p. 451 post. *Jex v. M'Kinney* (1889), 14 App. Cas. 79 (Mortmain Act had not been introduced into British Honduras by the Act of 1856 declaring the laws in force in the settlement); 1 Bl. Comm. 108.

(e) *Att.-Gen. v. Stewart* (1817), 2 Merriv. 143.

(f) See *Jephson v. Riera* (1835), 3 St. Tr. (N.S.) 591, as to Gibraltar, a possession acquired by conquest.

(g) (1889), 14 App. Cas. 286, 291.

(h) *Re Bishop of Natal* (1864), 3 Moore P. C. (N.S.) 148.

under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature subject to the decision and control of the King in Council; the whole of their Constitution being also liable to be new modelled and reformed by the general superintending power of the Legislature in the mother country.' Blackstone in that passage was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date, he would probably have added that, as the population, wealth, and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it, and that the power of remodelling its laws belongs also to the colonial legislature."

The effect of British statutes upon conquered or ceded colonies was elaborately discussed in the case of *Att.-Gen. v. Stewart* (i). The question there raised was whether the Statute of Mortmain (k) was in force in the island of Grenada. Sir William Grant, M.R., decided that it was not, and, after citing the passage from Blackstone which has been quoted above continued as follows: "Whether the Statute of Mortmain be in force in the island of Grenada will depend on this consideration—whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which property is governed by the rules of English law. Now the object of the Statute of Mortmain was wholly political; it grew out of local circumstances and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief in England, and not to regulate the power of devising or to prescribe the forms of alienation. The Mortmain Act, framed as it is, is quite inapplicable to Grenada or any other colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country. I am of opinion, therefore, that it constitutes no part of the law of the island of Grenada."

In *Whicker v. Hume* (l), the effect in a colony of this same statute was again discussed with reference to New South Wales, a colony planted by Englishmen, and not a conquered colony. It was contended that the decision in *Att.-Gen. v. Stewart* (m) was inapplicable. The House of Lords, however, held that the general principles laid down by Sir William Grant in the words above quoted were entirely correct and governed this case. "It is true," said Lord Chelmsford, "that the inhabitants of a conquered country have those laws only which are

(i) (1817), 2 Meriv. 143, 156. Cf. *Mayor of Lyons v. East India Company* (1836), 1 Moore Ind. App. 175.

(k) 9 Geo. 2, c. 36.

(l) (1858), 7 H. L. C. 124, 150.

(m) (1817), 2 Mer. 143.

established by the Sovereign of the conquering country, and that the colonists of a planted colony carry with them such laws of the mother country as are adapted to their new situation (*n*). But the opinion of Sir William Grant related generally, I think, to the Statute of Mortmain as applicable to all colonies, and therefore, upon general principles, I come without any hesitation to the conclusion that it is not applicable to New South Wales" (*o*).

The English law as to perpetuities "is founded," as the Judicial Committee said in *Yeap Chea Neo v. Ong Chea Neo* (*p*), "upon considerations of public policy, which seem to be as applicable to the condition of such a place as Penang as to England," and, consequently, it was held to extend to the settlement of Penang. In *Att.-Gen. for N. S. W. v. Love* (*q*), it was decided that the Nullum Tempus Act of 1769 (*r*), had *prima facie* been applied to the colony of New South Wales by the Australian Courts Act, 1828, and that it was not possible to limit the *prima facie* meaning of the latter Act by restricting "the laws and statutes" therein referred to to laws and statutes having relation to procedure only. The Judicial Committee in reaching its conclusions were affected by the opinions of colonial Judges as to the importance of the Nullum Tempus Act, in the administration of justice in the colony, and by judgments from 1849 based on the view that it did there apply (*s*).

The Act of 32 Hen. 8, c. 38, "For marriages to stand notwithstanding recontracts," has been held to be in force in Australia as the marriage laws of England had been introduced into New South Wales on its first settlement (*t*), and the Sunday Observance Act (29 Chas. 2, c. 7) (*u*), has been held to be in force in New South Wales. The Vagrancy Act, 1824, is not in force there (*x*). The Judgments Act, 1838 (*y*), is held not to apply to Queensland (*z*).

In considering whether a particular English statute applies to a colony, it is, of course, necessary to consider not only the

(*n*) "The common law of England is the common law of the plantations and all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony are in force in that colony unless there is some private Act to the contrary, though no statutes made since these settlements are there in force unless the colonies are particularly mentioned." In these words Richard West gave his opinion as to the Admiralty jurisdiction in the plantations, June 20, 1720. See *Opinions of Eminent Lawyers*, by George Chalmers, vol. ii, 202. Upon this rule depends the currency of the common law in the States of the American Union (other than Florida and Louisiana).

(*o*) Cf. *Jex v. M'Kinney* (1889), 14 App. Cas. 77; *Cooper v. Stuart* (1889), 14 App. Cas. 291.

(*p*) (1875), L. R. 6 P. C. 381, 394.

(*q*) [1898] A. C. 679, 685.

(*r*) The Crown Suits Act, 1769 (9 Geo. 3, c. 16).

(*s*) See Curlewis: Comparative Table of English Laws in force in N. S. W.

(*t*) *Major v. Miller* (1906), 4 Austr. C. L. R. 219.

(*u*) 29 Chas. 2, c. 7: *Scott v. Cawsey* (1907), 5 Austr. C. L. R. 132, 142, 157.

(*x*) *Mitchell v. Scales* (1907), 5 Austr. C. L. R. 405.

(*y*) 1 & 2 Vict. c. 110.

(*z*) *Reis Bros. v. Carling & Co.* (1908), 5 Austr. C. L. R. 673, 677.

circumstances of its inception, but the charter of justice constituting the Courts of the Colony (a).

The authorities as to the extension of English law to British possessions are collected in *Quan Yick v. Hinds* (b), where it was decided that the Lotteries Act, 1823, was not in force in New South Wales (c).

It has been held that the common law as to ancient lights as it stood at the passing of the Australian Courts Act, 1828, was a law which could be applied to the colony of New South Wales, and was so applied by virtue of section 24 of that Act, even if it had not already been brought by the first settlers (d). But by subsequent legislation this decision has been overridden except as to actions decided or pending before the passing of the statute (e).

Conquered or ceded colonies. *Prima facie* those parts of the British Empire which have been acquired by conquest or cession from a civilised Power remain under the laws of the Power to which they originally belonged (f), subject to the modifications (g) introduced since the conquest or cession; and in the construction of colonial Acts or ordinances in these colonies, regard must be had to the common law there prevailing, and to the special rules, if any, of construction adopted by that law.

India. India did not come precisely within the category either of planted or conquered colonies (h). "India," said the Judicial Committee in *Adv.-Gen. of Bengal v. Ranee Surnomoye Dossee* (i), "was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilised country under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown neither attempted nor pretended to interfere for some centuries

(a) For these charters so far as in force, see *Statutory Rules and Orders Revised* (edit. 1904) under the title of the colony concerned, and subsequent annual volumes of *St. R. & O.*, e.g., 1947, No. 1488; 1947, No. 2778.

(b) (1905), 2 Australian C. L. R. 345, 355, 366.

(c) Earlier Lotteries Acts seem to be in force there: *M'Hugh v. Robertson* (1885), 11 Victoria L. R. 410; *Att.-Gen. for N. S. W. v. Edgley* (1888), 9 N. S. W. L. R. 157; *Mutual Loan Agency v. Att.-Gen. for N. S. W.* (1909), 9 Australian C. L. R. 72.

(d) *Delohery v. Permanent Trustee Co. of N. S. W.* (1909), 1 Australian C. L. R. 283.

(e) Ancient Lights Act, 1904 (No. 16), of New South Wales.

(f) See Tarring's *Law of the Colonies* (4th ed.), ch. i, pp. 4-37. In Quebec the law of champerty was introduced as part of the English criminal law by the Quebec Act, 1774 (14 Geo. 3, c. 83): *Meloche v. Déguire* (1903), 34 Canada 25; folld. *Goodman v. R.* (1939), 4 D. L. R. 251 (reversed on another ground (1939), 4 D. L. R. 361).

(g) New York, Maine, and Jamaica were put under the common law of England. The civil law of Quebec, so far as it is not codified, rests on the custom of Paris. The civil and criminal law of the South African Colonies is based on the Roman-Dutch law; see Nathan: *Common Law of S. Africa*; *Journ. Society Comp. Leg. (N.S.)* 1905, p. 34. The South African Courts often have to consider whether a particular rule of Roman-Dutch law was carried to South Africa and made part of the local law. In British Guiana an ordinance was passed in 1904 (No. 12) abrogating the *Senatus Consultum Velleianum* and the rescript *Authentica si quae mulier*.

(h) See discussion of extent of British law in India: Ilbert, *Government of India* (3rd ed.), (1915), ch. iv. For the present position of India see pp. 475, *post*.

(i) (1863), 2 Moore P. C. (N.S.) 22, 59; 9 Moore Ind. App. 387, 391, 428, 429, 430, Lord Kingsdown.

afterwards. . . . The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindus are suited to Europeans." Consequently, "if the English laws were not applicable to Hindus on the first settlement of the country," the question arises, "how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but, until so altered, the laws remain unchanged." If, therefore, we wish to know whether any particular British statute binds the natives in India, it is necessary in the first place to ascertain whether, by any express enactment, British law has been introduced into the part of India in question, and then, if it appears that it has been so introduced, it is further necessary to consider, with regard to any particular enactment, whether it would be possible to enforce it among natives who are not Christians, but Mahomedans or Hindus, without intolerable injustice and cruelty. For instance, to apply the law against bigamy to a people among whom polygamy is a recognised institution would be monstrous, and accordingly it has not been so applied (*k*). It was accordingly held that the English law of *felo de se* and consequent forfeiture of property did not extend to the natives in any part of India before the enactment in 1844 of s. 309 of the Indian Penal Code (*l*). Similarly, in *Ram Coomar Coondoo v. Chunder Canto Mookerje* (*m*), it was held "that the English laws of maintenance and champerty are not of force as specific laws in India. . . . They were laws," said the Judicial Committee, "of a special character directed against abuses prevalent it may be in England in early times, and had fallen into at least comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law" (*n*). The rule in *Shelley's Case* was held not to apply to the dispositions of a

(*k*) The Indian Penal Code, s. 494, punishes bigamy by Hindu or Mahomedan women, but not by Hindu or Mahomedan men: Nelson: Ind. Pen. Code (5th ed.) 882. For remarks on the introduction of English law into India see *per* Lord Lyndhurst in *Freeman v. Fairlie* (1828), 1 Moore Ind. App. 305, at p. 343.

(*l*) *Advocate-General of Bengal v. Ranee Surnomoye Dossee* (1863), 9 Moore Ind. App. 387, 391, 431.

(*m*) (1876), 2 App. Cas. 186, 208, 4 L. R. Ind. App. 23, 46. *Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu* (1907), L. R. 35 Ind. App. 48.

(*n*) See *Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu*, *supra*.

Parsi (o). So also in *Mayor of Lyons v. East India Company* (p), it was held that the English law incapacitating aliens from holding real property has never been introduced into India, and the statutes against superstitious uses as regards Hindu religious endowments (q), and the Sunday Observance Acts (r), have been declared inapplicable, nor did the English rule as to marriage with a deceased wife's sister extend to persons in India who were not by origin or domicil English (s). The principles of the feudal law are likewise inapplicable to a Hindu zemindar (t) and the *Tagore Case* (u), held that English authorities as to the transfer of property and right of inheritance or succession thereto were of little or no assistance in India. Further, the difference in English law between real and personal property does not always obtain in India (x), although the English law relating to personalty applies to personalty in India held by British subjects and by those to whom the English law is applicable—e.g., Armenians (v). But in *Ruckmaboye v. Lulloobhoy* (z), the Limitation Act, 1623 (a), was held to extend to India and to apply to Hindus and Mahomedans as well as to European British subjects. The English law of dower has been held to obtain in India among Europeans and Armenians as a part of the law of inheritance (b), and the English law of inheritance has been applied to the Portuguese of Bombay (c), and the English law of trusts has been to some extent applied (d). The case cited held that the English law was applicable at the date of the Indian Trustee Act, 1866, to all cases in which peculiarly equitable doctrines had been recognised in relations between natives of Bombay. The Hindu system also recognised trusts.

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- (o) *Mithibai v. Limji Nowroji* (1881), Ind. L. R. 5 Bombay 506; 6 *ibid*, 151.
 (p) (1836), 1 Moore Ind. App. 175, 286, 3 St. Tr. (N.S.) 647.
 (q) *Kusalchand v. Mahadev Giri* (1875), 12 Bombay H. C. 214.
 (r) *Param Shook Doss v. Rasheed Ood Dowlah* (1874), 7 Mad. H. C. Rep. 285.
 (s) *Sheoram Tiwari v. Thakur Prasad* (1908), Ind. L. R. 30 Allahabad 136.
 (t) *Lopez v. Lopez* (1885), Ind. L. R. 12 Calcutta 706.
 (u) *Ranee Sonet Koor v. Mirza Himmut Bahadur* (1876), L. R. 3 Ind. App. 92.
 (v) (1872), L. R. Supp. Ind. App. 47, 64.
 (x) *Dorab Ally Khan v. Abdool Azees* (1878), L. R. 5 Ind. App. 116, 126.
 (y) *Nicholas v. Asphar* (1896), Ind. L. R. 24 Cal. 216.
 (z) (1850), 8 Moore P. C. 4; 5 Moore Ind. App. 234.
 (a) 21 Jas. 1, c. 16. This branch of law is now dealt with by Indian legislation; Limitation Acts of 1859, 1871, 1877, 1908. As to the application of English decisions to this last Act, cf. *Panchani v. Ansar Husain* (1926), L. R. 53 Ind. App. 187, 193.
 (b) *Gobind Lal v. Debendromath* (1880), Ind. L. R. 5 Calcutta 679 policy of English Act (Property Limitation Act, 1833, adopted in construing Art 142 of Schedule II of Indian Limitation Act, 1877)
 (c) *Sarkies v. Proxonomayec Dossee* (1881), Ind. L. R. 6 Calcutta 794; *Nicholas v. Asphar* (1896), Ind. L. R. 24 Calcutta 216. As to Parsis outside the Presidency towns, see *Mithibai v. Limji Nowroji* (1881), Ind. L. R. 5 Bombay 506; 6 *ibid*. 151.
 (d) *Lopez v. Lopez* (1867), 5 Bombay H. C. 172.
 (e) *Re Kahandas* (1880), Ind. L. R. 5 Bombay 154. See now the Indian Trusts Act, 1882.

CHAPTER IX

THE LEGISLATION OF DOMINIONS, COLONIES,
PROTECTORATES AND MANDATED TERRITORIES

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Definition of British possession.

1. The term "British possession" in this chapter includes all parts of the King's dominions exclusive of the United Kingdom, *i.e.*, the Channel Islands and Isle of Man, British India and the Dominions and colonies (*a*), but the chapter as a whole must be read subject to the provisions of the Statute of Westminster, 1931 (set out in Appendix C), to the alterations in the legal position of Canada (*b*), and South Africa and since 1947 New Zealand effected by that Act and to the possibility of Australia adopting the provisions of the statute giving rise to that alteration.

General rules for interpreting Dominion and Colonial Acts.

2. Speaking generally, the rules adopted for the interpretation of colonial and former Indian legislation are the same as those accepted for statutes of the United Kingdom (*c*). But the Judicial Committee does not seek to import purely English ideas and conceptions into the interpretation of colonial law or conveyancing practice. As the Privy Council has said: "It is in their Lordships' opinion eminently desirable that the utmost respect should be paid to the customary and acknowledged interpretation both by Judges and among the people

(*a*) See Interpretation Act, 1889, s. 18 (2), *post*, App. B, and the Statute of Westminster, 1931, ss. 10 (3), 11, App. C. Since August 15, 1947, there are two independent dominions in India, known as India and Pakistan, and Ceylon is a Dominion since February 4, 1948.

(*b*) Newfoundland is now a Province of Canada, see p. 445, *ante*.

(*c*) See p. 130, *ante*.

of the Transvaal and the Cape of Good Hope of their ancient and accustomed forms of transmission of property at death," and after quoting the judgment of the Chief Justice, "The law so settled must be respected and maintained" (d).

When an English or British Act is transplanted, or by legislation in general terms extended to a British possession, the construction to be put on the Act is ordinarily that adopted by the English Courts (e), at the date when the Act was embodied in colonial legislation (f).

Reference to English Acts to construe colonial Acts. Where a colonial Legislature re-enacts in substantially the same terms a British Act not originally applying to the colony, the adopted enactment is to be construed in the colony in the same way as the original enactment (g). The two are treated as being *in pari materia* (h). Though the language of the British Income Tax Act and that of the New Zealand Act were not indetical, there was sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the New Zealand Act (i). But often a colonial Act is not an exact transcript of home legislation (j). Thus in *Robinson v. Canadian Pacific Ry.* (k), and in *Miller v. Canada Grand Trunk Ry.* (l), it was held that Art. 1056 of the Quebec Civil Code could not be treated as an exact transcript of, nor construed in the same way as, the Fatal Accidents Act, 1846.

Throughout the British Empire, English books and cases on the construction of the statute law are freely cited and frequently followed; and the decisions of the Privy Council tend to produce uniformity of construction throughout the Empire. Thus in *Railton v. Wood* (m),

(d) *Natal Bank v. Rood*, [1910] A. C. 570, 588, 590, and see Tarring, *Law of the Colonies* (5th ed.), 1906, chap. iii.

(e) See *Att.-Gen. for British Columbia v. Att.-Gen. for Canada* (1889), 14 App. Cas. 301, and *Watts v. Watts*, [1908] A. C. 573, on the effect of the English Law Ordinance of 1867 of British Columbia; and *Walker v. Walker*, [1919] A. C. 947, on the effect of 51 Vict. c. 33 (Dom.) in applying English statute law to Manitoba; *Board v. Board*, [1919] A. C. 956, as to the effect of 49 Vict. c. 25 (Dom.) in applying the Matrimonial Causes Act, 1857, to Alberta.

(f) See *Queensland Trustees, Ltd. v. Finney*, [1905] Queensland State Rep. 98, 105; *Watt v. Caldwell* (1900), 21 N. S. W. Rep. (Eq.) 93, on the construction of a colonial transcript of Locke King's Act (17 & 18 Vict. c. 113). The amending Acts had not been adopted in Queensland.

(g) *Catterall v. Sweetman* (1845), 9 Jur. 951, 954, *per Dr. Lushington* approved by P. C. in *Trimble v. Hill* (1880), 5 App. Cas. 342; *Stuart v. Bank of Montreal* (1909), 41 S. C. R. 516, 548; Anglin, J., *Will v. Bank of Montreal* (1931), 3 Dom. L. R. 526; following *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777; *Nadarajan Chettiar v. Walauwa Mahatmee* (1950), 66 T. L. R. (Pt. 2), p. 15, and see p. 130, *ante*.

(h) See *Harding v. Commissioners of Stamps*, [1898] A. C. 769, 773, as to the Queensland Succession and Probate Duties Act, 1892, defining a "succession" in terms of the Succession Duty Act, 1853.

(i) *Lovell & Christmas, Ltd. v. Commissioners of Taxes*, [1908] A. C. 46, 51, *per Sir Arthur Wilson*.

(j) *Lewin v. Wilson* (1886), 11 App. Cas. 639, 645.

(k) [1892] A. C. 481.

(l) [1906] A. C. 187.

(m) (1890), 15 App. Cas. 363, 366 (on the N. S. W. Insolvent Act, 1841).

the Judicial Committee adopted, in the construction of a New South Wales statute, the canons of construction laid down by Lord Selborne, L.C., in *E. & W. India Dock Co. v. Hill* (*n*), and by Lord Cairns in the House of Lords in the same case (*o*). But in cases of ambiguity in a colonial Act, the Privy Council may have difficulty in accurately ascertaining what is the special scope or policy of the statute brought into question before them. The Judicial Committee reversed two decisions of the Supreme Court of New South Wales (*p*), both turning on the policy of statutes, relating in one case to land and the other to insolvency, in which the colonial and English notions of policy may very well have differed essentially, unless the meaning of the word "policy" is restricted to "the intention of the Legislature as deducible from the terms used": and the decision of that Board in *Wallis v. Solicitor-General for New Zealand* (*q*), that as the application of a charitable purpose could not take effect, the doctrine of *cy-près* should be applied to the land provided by Maori chiefs in 1848, is said to have become the subject of hostile criticism in New Zealand as being inconsistent with a previous decision of the Board (*r*), which laid down that the rightful possession of land by the natives must be recognised until those rights were extinguished either by cession to the Crown or a proceeding legally effective for that purpose.

Where the dominion or colonial differs from the British method of dealing with the subject-matter, decisions upon British Acts must be applied cautiously, if at all, to that legislation. "There are decisions on the construction of English statutes with reference to English methods of taxation which would be of great value if it were first found that the Victorian Legislature had adopted any such method, but which are of little value until that conclusion has been reached. It appears to their lordships that the Court below has first searched for a rule of law, and has then bent the statute in accordance with it; whereas, until the true scope and intention of the statute has been discovered, it cannot be seen what rules of law are applicable to it" (*s*).

Authorities competent to legislate for Dominions and Colonies.

3. In all parts of the King's dominions outside the British Islands (*t*), the legislative authority is vested either in the King in Council, or in a law-making body created (i) by the authority of the Crown expressed by charter, proclamation, or Order in Council, or (ii) by the authority of Parliament expressed in an Imperial statute

(*n*) (1882), 22 Ch. D. 14, C. A.

(*o*) (1884), 9 App. Cas. 453, 457 (on s. 43 of the Bankruptcy Act, 1869).

(*p*) *Alison v. Burns* (1889), 15 App. Cas. 44; *Railton v. Wood*, *supra*.

(*q*) [1903] A. C. 173.

(*r*) *Nireahana Tamaki v. Baker*, [1901] A. C. 561.

(*s*) *Blackwood v. R.* (1882), 8 App. Cas. 82, 91, Sir Arthur Hobhouse.

(*t*) Defined, p. 456, *ante*. As to the Channel Islands and the Isle of Man, see p. 443, *ante*.

creating or authorising the creation of a constitution (*u*). The Bahamas, Barbados, Bermuda, the Leeward Islands and British Honduras are colonies which are not subject to legislation by Order in Council (*x*).

Protectorates. In addition to her colonies, the United Kingdom is responsible for the government of many Protectorates chiefly in Africa: these are the Aden Protectorate, Basutoland and Bechuanaland and Swaziland Protectorates; Ashanti (now represented on Legislative Council of Gold Coast); Kenya Protectorate; Nigeria (which has a Legislative Council); Nyasaland, whose government is practically that of a Crown Colony with a Legislative Council; Somaliland, Uganda, N. Territories of Gold Coast, parts of Sierra Leone, Tanganyika and Zanzibar.

In *Sobhuza II v. Miller* (*y*), Viscount Haldane explained the meaning of a Protectorate. The extension of British jurisdiction to a British Protectorate by Orders in Council is an exercise of an Act of State and therefore unchallengeable in Courts of law. The jurisdiction given by the Foreign Jurisdiction Act, 1890, is indistinguishable in legal effect from that acquired by conquest. The Crown cannot, except by statute, deprive itself of the freedom to make Orders in Council even if (as in that case) inconsistent with previous Orders.

On the conquest or cession of territory, or the assumption of authority over a protectorate or "sphere of influence," the Crown is entitled to legislate by proclamation for the newly-acquired possession or Protectorate. The Crown legislates by Orders in Council for colonial Protectorates under the provisions of the Foreign Jurisdictions Acts, 1890 and 1913, and does so both for British protected persons and foreigners (*z*). Proclamation was adopted on the conquest of French Canada and Grenada (*a*), of Ceylon (*b*), of the Transvaal (*c*), and

(*u*) See *Campbell v. Hall* (1774), 1 Cowp. 204; 20 St. Tr. 239; 6 Geo. 3, c. 12, *post*, p. 460; *Att.-Gen. for Canada v. Cain and Gilhula*, [1906] A. C. 542. As to peculiar position of the Irish Free State down to 1949, see Anson's *Law of the Constitution* (4th ed., 1935), vol. ii, part ii p. 91, 97—99; see p. 445, *ante*.

(*x*) A useful classification of colonial constitutions according to legislative powers is to be found in Wade and Phillips' *Constitutional Law* (3rd ed.), (1946), pp. 364—368, a work of which use has been made throughout this chapter. See also Keith's *Governments of the British Empire*, (1935) p. 20.

(*y*) [1926] A. C. 518, 522.

(*z*) See *R. v. Crewe (Earl), Ex p. Sekgome*, [1910] 2 K. B. 576, 626, for legislative powers in a protectorate *per* Kennedy, L. J.; Wade and Phillips, *op. cit.*, p. 369; Halsbury, *Laws of England*, 2nd ed., vol. xi, pp. 9, 149-156.

(*a*) Oct. 7, 1763. See recitals of the Quebec Act, 1774 (14 Geo. 3, c. 83), and *Campbell v. Hall* (1775), 20 St. Tr. 239, 322, as to Grenada.

(*b*) Cf. Proclamation as to administration of justice, Sept. 23, 1799; St. R. & O. Rev. (edit. 1904), tit. "Ceylon," 1. (New Constitution, 1931.) "Which is a sort of compromise between Crown Colony Government and full responsible Government." (Anson, vol. ii, Part II, 74.) The Crown retained power to legislate by Order in Council which was used in July, 1934. Ceylon became a Dominion on February 4, 1948.

(*c*) See the Transvaal Proclamations, 1900 to 1902 (there described as statutory proclamations, doubtless to distinguish them from executive proclamations), which repeal many laws and resolutions of the Volksraad of the former South Africa Republic. As to the judicial right of testing those laws and resolutions, see *Hess v. State* (1895), 2 S. African Off. Rep. 112.

of the Orange Free State (*d*). It is usually resorted to only within a short time after the acquisition of a new possession. Parliament may at any time interfere by legislation (*e*) to take away or control this prerogative, and even when it has not done so the Crown usually acts by charter or Order in Council.

In certain cases a colonial governor is, under the Crown, the sole legislative authority, *e.g.*, in the case of Basutoland, and the Bechuanaland Protectorate (*f*). The legislation is usually effected by proclamation. The limitations of an authority given by a colonial statute to a governor to legislate in this manner were considered in *Sprigg v. Sigcau* (*g*), where the Governor of Pondoland by proclamation purported to set aside the established law as to arrest, trial, conviction and duration of punishment, which was to be in the discretion of the governor. The Judicial Committee held this to be *ultra vires* his authority or of any authority at all save that of an irresponsible sovereign or a supreme and unfettered Legislature. On the other hand in *R. v. Crewe (Earl), Ex p. Sekgomé* (*h*), the High Commissioner for South Africa was authorised to do in the Bechuanaland Protectorate all things as are lawful to provide by proclamation for order and good government. Sekgomé had been detained on proclamation as necessary for the preservation of peace. The detention was held to be lawful. The Protectorate was a foreign country in which His Majesty had jurisdiction within the Foreign Jurisdiction Act, 1890, and the proclamation had been duly made under the powers conferred on the governor by Order in Council.

Charters granted to companies or settlers. The original system of government in certain territories, *e.g.*, India, was regulated by charters, *i.e.*, letters patent under the Great Seal (*i*), issued by the Crown to trading companies. Such charters are not now issued, except under authority of Parliament (*j*). The Legislatures of many British possessions have been created by charter (*k*).

The former British colonies, now comprised in the United States

(*d*) The validity of some proclamations issued in this Colony by the Governor (who for a time absorbed all executive, legislative and judicial functions) has been challenged: see Orange River Ordinance No. 1 of 1902.

(*e*) *Campbell v. Hall* (1774), 20 St. Tr. 239, 304.

(*f*) In 1930 the administration of these places passed from the Governor-General of South Africa to a High Commissioner directly responsible to the British Government; see *Tshekedi Khama v. Ratshosa*, [1931] A. C. 784. Other colonies and Protectorates which have no Legislative Assembly are Cyprus, Gilbert and Ellis Islands, British North Borneo, British Solomon Islands, Northern Territories of the Gold Coast (see Colonial Office List, 1950, p. 147), St. Helena and British Somaliland. Since 1946 Ashanti has been represented on the Legislative Council of the Gold Coast (cf. St. R. & O. 1946, No. 353).

(*g*) [1897] A. C. 237.

(*h*) [1910] 2 K. B. 576.

(*i*) As to the Indian charters, see Ilbert: Government of India (3rd ed.), chap. i. Cowell, Courts and Legislative Authorities in India, Lectures I and II.

(*j*) *E.g.*, Rhodesia; British North Borneo. (S. Rhodesia became self-governing in 1923.)

(*k*) Jenkyns: British Rule, etc., beyond the Seas, 13.

of America, were for the most part governed under charters, and the validity of enactments passed by the local law-making body was tested by reference to the charters in much the same way as bylaws made by municipal corporations or chartered guilds, companies, or societies in England. Since the creation of the federal constitution of the United States, the federal and state Courts have freely exercised the power of pronouncing upon the validity of federal and state legislation by reference to the instruments determining the respective constitutions and powers of the federal and local Legislatures (*l*).

Orders in Council. The Crown may legislate by Order in Council for ceded or conquered colonies (*m*) as to which the Royal power has not been specifically granted away or delegated (*n*). This power has been in many instances exercised for the purpose of framing or approving a colonial constitution. Where the constitution is so framed, and immediately and irrevocably grants what Lord Mansfield called "the subordinate legislation" over the possession to a representative, *i.e.*, an elective assembly, the power to legislate by Order in Council is spent (*o*) or suspended till the colony surrenders its representative constitution (*p*). A power of legislation on certain subjects is frequently reserved to the Crown as in the Letters Patent to the Governor of Malta, 1930. A power to alter a colonial constitution by Order in Council can be exercised retrospectively (*q*). It appears that the Crown's right to legislate by Order in Council for ceded colonies might be affected by the terms of cession (*r*). As regards the Straits Settlements the power of the Crown to make laws and to constitute Courts is statutory (*s*).

A doubt arose as to the power of the Crown to legislate by Order in Council for territories where there is no civilised government in which settlements are made by British subjects and which become British possessions. This doubt was resolved by the British Settlements Act, 1887, which empowers the King in Council to make and alter laws for such territories. The Act does not apply to possessions acquired by cession or conquest, nor to possessions which for the time being have been brought within the jurisdiction of the Legislature

(*l*) See Cooley, *Constitutional Limitations* (6th ed.).

(*m*) *Kielley v. Carson* (1843), 4 St. Tr. (N.S.) 669; Jenkyns: *British Rule, etc., beyond the Seas*; Anson, *Law of the Constitution*, vol. ii, pt. ii, p. 64; Keith's *Governments of the British Empire* (1935), p. 15.

(*n*) Jenkyns, *British Rule, etc., beyond the Seas* gives a list (App. II) of the cases in which the power has been abandoned.

(*o*) *Campbell v. Hall* (1774), 1 Cowp. 204; 20 St. Tr. 239, 327, 329; Anson: *Law of the Constitution* (4th ed., 1935), vol. ii, p. 64; Jenkyns: *British Rule, etc., beyond the Seas*, 91, 92.

(*p*) See Anson, *op. cit.*, ii, 65.

(*q*) *Abeyesekera v. Jayatilake*, [1932] A. C. 260.

(*r*) *Amodu Tijani v. Secretary of Southern Nigeria*, [1921] 2 A. C. 399; (native tenure of land, usufruct, not affected by cession in 1865), applied *Simmonu v. Disu Raphael*, [1927] A. C. 881, and distinguished *Sakariyawo Oshodi v. Moriamo Dakolo*, [1930] A. C. 667; *Eshugbayi Eleko v. Govt. of Nigeria*, [1931] A. C. 662 (deportation order valid.)

(*s*) 29 & 30 Vict. c. 115.

of any British possession (t) otherwise than by virtue of the Act of 1887, or of the Acts of 1843 and 1860, which it repeals (u).

Imperial legislation. Imperial legislation extending to British possessions falls into three classes:—(i) That creating a general law for imperial purposes (x); (ii) that determining the constitution of a possession or some matter peculiar to the possession; (iii) regulating a particular branch of law in one or more possessions, e.g., the Colonial Courts of Admiralty Acts (y), and the Indian Insolvency Act (z).

In modern Acts extending to the whole Empire it is usual to insert a clause limiting or suspending the operation of the Act in British possessions so long as local legislation on the same subject is in force (a).

The American Colonies Act, 1766, declaring the legislative competence of the British Parliament over the American colonies seems to be still in force, if and so far as it applies to Canada and the West India Islands (b). But since the passing of the Taxation of Colonies Act, 1778, taxing Acts are not expressed to extend to colonies, except with reference to duties for the regulation of commerce, and these, if collected in a colony, must be spent there.

It is provided by section 151 of the Customs Consolidation Act, 1876, that the Customs Acts extend to all British possessions abroad, except where otherwise expressly provided, or where limited by express reference to the United Kingdom or Channel Islands, and except as to such possession as it shall by local Act or ordinance have provided, or may hereafter with the sanction of His Majesty make entire provision for the management and regulation of the local customs, or in like manner make express provisions in lieu or in variation of any of the clauses of the Act of 1876.

The Fugitive Offenders Act, 1881 (c), applies, and the Colonial Prisoners Removal Act, 1884, may be applied to all British possessions.

Sections 735 and 736 of the Merchant Shipping Act, 1894, are to be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion (d). Section 4 of the Colonial Courts of Admiralty Act, 1890, requiring certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause and so much

(t) See s. 6.

(u) The repealed Acts related to the Falkland Islands and the West Coast of Africa.

(x) See Jenkyns, *British Rule, etc., beyond the Seas*, chap. ii.

(y) As to an apparent conflict between the Colonial Courts of Admiralty Act, 1890, and a Dominion Act of 1891, see *Richelieu, etc., Co. v. S.S. Cape Breton*, [1907] A. C. 112 (appeal lies as of right from Supreme Court of Canada in Admiralty); and *Bow, McLachlan & Co. v. Ship Camosan*, [1909] A. C. 597 (Jurisdiction of Exchequer Court of Canada in Admiralty).

(z) 11 & 12 Vict. c. 21. Repealed by Indian Act No. 3 of 1909.

(a) This seems to have been suggested by the decision in *Campbell v. Hall* (1774), 20 St. Tr. 239, 321.

(b) See Dicey, *Constitution* (9th ed.), 66.

(c) This Act continued in the Irish Free State under the Act of 1922; *Irish Free State (Kennedy) v. Little*, [1931] Ir. R. 39.

(d) The Statute of Westminster, 1931, s. 5.

of section 7 of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, ceased to have effect in any Dominion as from December 11, 1931 (e).

The Extradition Acts, 1870, 1873, 1895 and 1906, and the International Copyright Acts of 1847 and 1886, and the Merchant Shipping Act, 1894, contain suspensory clauses.

A colonial law which assigns jurisdiction to a Court created under an imperial Act is not invalid, but certain of the Judges (Strong and Henry, JJ., at pp. 710, 713) in *Att.-Gen. for Canada v. Flint* (f) were of opinion that the assigned Court might decline jurisdiction "for, as it is a Court erected for the purpose of executing the judicial powers vested in the office of the Admiral, it is subject to no legislative power except that of the Imperial Parliament." Ritchie, C.J., expressed no opinion on this point.

Distinction between British and Dominion and colonial legislation.

4. In one very important respect the legislation of a British possession differs from that of the United Kingdom. Acts of the Imperial Parliament, as has been already pointed out, cannot be questioned as *ultra vires* or invalid by any Court (g).

The constitutions granted to British possessions, whether by proclamation, charter, Order in Council, or imperial statute, differ from that of the United Kingdom in being written, and in being not original but derivative and thus in a sense subordinate, and in being more or less rigid and restrictive of the legislative body which they create. In the case of such Legislatures the Courts of the possession, and in the last resort the Judicial Committee of the Privy Council, may have to adjudicate not only on the meaning of a statute or ordinance, but also as to its validity by reference to the instruments creating the authority to legislate. As to the latter question they have to discharge a function analogous to that discharged by an English Court in dealing with subordinate legislation (h), but more closely resembling the functions of the Supreme Court of the United States with respect to the limits *inter se* of state and federal legislative competence. This rule is thus expressed in *Hari v. Secretary of State for India* (i), by Jenkins, C.J.: "It will be seen that the really important question in this case is whether the City of Bombay Improvement

(e) The Statute of Westminster, 1931, s. 6.

(f) (1884), 16 Canada, Appendix 707, 709, following *Valin v. Langlois* (1879), 5 App. Cas. 115. (Election petitions, exclusively within jurisdiction of Canadian Dominion Parliament, may be tried by Courts of ordinary jurisdiction in the Provinces.) Cf. *Kennedy v. Purcell* (1888), 59 L. T. 279, 280, 281.

(g) Dicey, *Constitution* (9th ed.), pp. 102 *et seq.*, describes colonial Legislatures and those of countries having rigid constitutions as non-sovereign law-making bodies.

(h) See pp. 268 *et seq.*, *ante*.

(i) (1903), Ind. L. R. 27 Bombay 425, 439.

Act (Act iv of 1898) was within the power of the local Legislature, and that I propose first to consider. It is a legitimate source of discussion in this Court, for the Governor of this Presidency in Council is a subordinate Legislature whose authority in the way of law-making is subject to and dependent upon the Acts of Parliament from which their legislative powers are derived, so that we have the right, and are charged with the duty, of deciding judicially whether the impugned legislation is within the scope of their authority."

In dealing with colonial constitutions, the Judicial Committee declines to lay down any hard and fast rules of construction (*k*); and the tendency of its decisions is to extend (*l*) and not to limit the authority of colonial Legislatures, which are recognised as supreme within their own domain.

Colonial constitutions cannot be repealed or amended by colonial Legislatures unless they contain express provisions to that effect. The British North America Act, 1867, can be amended only by the Imperial Parliament (*m*), but the Constitution Acts of the Australian States in most cases (*n*), and that of the Australian Commonwealth (*o*), and the South African Union (*p*) contain provisions empowering the local and central colonial Legislatures to amend certain parts of the constitution (*q*).

The legislative bodies in what was formerly British India (*r*), and other British possessions are not delegates of the Imperial Legislature. They are restricted in the area of their powers, but within that area are supreme.

India. In *R. v. Burah* (*s*), the Judicial Committee in speaking of the powers of the Legislative Council of India said: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of

(*k*) *Citizens' Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Hodge v. R.* (1883), 9 App. Cas. 117, 128.

(*l*) *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282, 290; *Musgrove v. Chung Teeong Toy*, [1891] A. C. 272, *Att.-Gen. for Canada v. Cain and Gilhula*, [1906] A. C. 542 (immigration).

(*m*) See Todd, *Parliamentary Government in the Colonies* (2nd ed.), pp. 29, 209; Keith, p. 45; 34 & 35 Vict. c. 28; 38 & 39 Vict. cc. 38, 53; 49 & 50 Vict. c. 35; 7 Edw. 7, c. 11.

(*n*) *E.g.*, Western Australia Constitution Act, 1890, s. 5.

(*o*) See 63 & 64 Vict. c. 12, Sched. art. 128.

(*p*) 9 Edw. 7, c. 9, s. 152.

(*q*) The Statute of Westminster, 1931, has not granted any further power of amendment of these constitutions.

(*r*) See the judgment of Bhashyam Ayyangar, J., in *Bell v. Madras Municipal Commissioners* (1902), Ind. L. R. 25 Madras 457, 459, as to the powers of the Madras Legislative Council, and the judgment of Jenkins, C.J., in *Hari v. Secretary of State for India* (1903), Ind. L. R. 27 Bombay 425, 439, as to the power of the Bombay Legislative Council; *supra*; and Dicey: *Law of the Constitution* (9th ed.), p. 99.

(*s*) (1878), 3 App. Cas. 889, 904; L. R. 5 Ind. App. 178, 193, Lord Selborne.

legislation as large and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted."

The Indian Independence Act, 1947 (*t*), set up two independent Dominions in India to be known as India and Pakistan. In April, 1949, a conference of the Dominion Prime Ministers was held in London to consider the position of the Dominion of India if she declared for a sovereign independent republic while desiring to remain within the British Commonwealth of Nations. The following declaration was published on April 28, 1949:

"The Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon, whose countries are united as Members of the British Commonwealth of Nations and owe a common allegiance to the Crown, which is also the emblem of their free association, have considered the impending constitutional changes in India.

"The Government of India have informed the other Governments of the Commonwealth of the intention of the Indian people that under the new constitution which is about to be adopted India shall become a sovereign independent republic. The Government of India have, however, declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of The King as the symbol of the free association of the independent member nations and as such the Head of the Commonwealth (*u*).

"The Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth is not hereby changed, accept and recognise India's continuing membership in accordance with the terms of this declaration.

"Accordingly the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan, and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress."

His Majesty the King was informed as soon as the declaration was made and expressed his approval.

Canada. In *Hodge v. R.* (*w*), which turned on the British North America Act, 1867, Sir Barnes Peacock said: "It appears to their lordships . . . that the objection thus raised by the appellants (to the Liquor Licence Act, 1887, of Ontario) is founded on an entire misconception of the true character and position of the provincial

(*t*) 10 & 11 Geo. 6, c. 30.

(*u*) Cf. India (Consequential Provision) Act, 1949 (12, 13 & 14 Geo. 6, c. 92).

(*w*) (1883), 9 App. Cas. 117, 132. Cf. *Arthur Yates & Co., Proprietary, Ltd v. Vegetable Seeds Committee*, [1945] *Arctus* (Australia) L. R. 474.

legislatures (of Canada). They are in no sense delegates of, or acting under any mandate of, the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by section 92, as this Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation to make bylaws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect" (y).

In *Powell v. Apollo Candle Co.* (z), which turned on the validity of the Customs Regulation Act, 1879, of New South Wales, the Judicial Committee applied to Australia the constitutional law laid down as to India in *R. v. Burah*, and as to Canada in *Hodge v. R.* (a). In *Att.-Gen. for Canada v. Cain and Gilhula* (b), the rule laid down in *Hodge v. R.* was accepted and applied for the purpose of declaring *intra vires* the Dominion Parliament as delegate of the Crown to enact the Alien Labour Laws of Canada, under which power was given to Canadian officials to deport certain classes of aliens, and for this purpose to exercise powers of extra-territorial constraint, which were held to be complementary to the internationally recognised power of a sovereign state to exclude or expel aliens from its territory (c).

The Statute of Westminster, 1931.

5. By the Statute of Westminster, 1931, s. 2 (1), the Colonial Laws Validity Act, 1865, shall thenceforth not apply to any law made by the Parliament of a Dominion. By s. 3 the Parliament of a Dominion has power to make laws having extra-territorial operation. By s. 4 no Act passed by the Parliament of the United Kingdom shall extend to a Dominion as part of its law, unless it is expressly declared in that Act that that Dominion had requested and consented to its enactment. Sections 5 and 6 provide exemptions from the operation of certain sections of the Merchant Shipping Act, 1894, and the Colonial Courts

(y) As to *ultra vires* provincial Acts, see *post*, pp. 75, *et seq.*

(z) (1885), 10 App. Cas. 282.

(a) *Supra*. See also *Baxter v. Ah Way* (1909), 8 Australian C. L. R. 626, and *Nelson v. Brasley* (No. 2), [1934] N. Z. L. R. 559, for application of these rules to Commonwealth legislation, and also *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan* (1931), 46 Australian C. L. R. 73, 84.

(b) [1906] A. C. 542.

(c) Cf. *Musgrove v. Chung Teeong Toy*, [1891] A. C. 272, as to the exclusion of Chinese from Victoria. *Co-operative Committee on Japanese Canadians v. Att.-Gen. for Canada*, [1947] A. C. 87.

of Admiralty Act, 1890. By s. 10 of the statute none of the foregoing sections apply unless adopted by the Parliament of the Dominion, whose Act may specify when the adoption shall take effect. The Dominions to which section 10 applies are Australia, New Zealand and formerly Newfoundland (*d*). Canada is affected by section 2 as to the laws made by her provincial Legislatures and their powers. Otherwise Canada's constitution and legislative powers are regulated by the British North America Acts, 1867 to 1949. Newfoundland became a province of Canada from immediately before the expiry of March 31, 1949, by agreement confirmed by the British North America Act, 1949 (*e*). The Union of South Africa is included in the provisions of the statute by virtue of the sections summarised above, and this applied up to 1949 to the Irish Free State (Eire). By the Ireland Act, 1949 (*f*), Eire ceased from April 18, 1949, to be a part of His Majesty's dominions and the Republic of Ireland was set up. (s. 1 (1)). By s. 2 (1) the Republic of Ireland is not a foreign country for the purpose of any law in force in any part of the United Kingdom or its colonies, protectorates or trust territories.

As to New Zealand, at her request and with her consent under s. 4 of the Statute of Westminster, 1931, the New Zealand Constitution (Amendment) Act, 1947, was passed (*g*). It provides that the New Zealand Parliament may alter, suspend or repeal all or any of the provisions of the New Zealand Constitution Act, 1852 (*h*) and repeals the New Zealand Constitution (Amendment) Act, 1857 (*i*). This Act was the consequence of the passing by the New Zealand Parliament of the Statute of Westminster Adoption Act, 1947, adopting sections 2-6 of the Statute of Westminster, section 8 of which ceased thenceforth to be operative.

Australia thus remains the only Dominion affected by section 10 of the Statute of Westminster. Ceylon acquired independence as a Dominion by the Ceylon Independence Act, 1947 (*j*) as from February 4, 1948.

The Colonial Laws Validity Act.

6. The only express general provisions in the imperial statute book with reference to the validity of colonial laws are contained in the Colonial Laws Validity Act, 1865 (*k*). This Act did not apply to India.

(*d*) The constitution of Newfoundland was suspended and since 1934 had been under a commission; Keith, p. 16.

(*e*) 12 & 13 Geo. 6, c. 22, passed on March 23, 1949.

(*f*) 12 & 13 Geo. 6, c. 41.

(*g*) 11 & 12 Geo. 6, c. 4.

(*h*) 15 & 16 Vict. c. 72.

(*i*) 20 & 21 Vict. c. 53.

(*j*) 11 & 12 Geo. 6, c. 7.

(*k*) This Act is expressly saved by the Evidence (Colonial Statutes) Act, 1907, s. 1 (4).

The material portions of the Colonial Laws Validity Act, 1865, are as follows:—

Section 1. "The term 'colony' shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty under or by virtue of any Act of Parliament for the government of India:

"The terms 'legislature' and 'colonial legislature' shall severally signify the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony:

"The term 'representative legislature' shall signify any colonial legislature which shall comprise a legislative body, of which one half are elected by inhabitants of the colony:

"The term 'colonial law' shall include laws made for any colony either by such legislature as aforesaid or by Her Majesty in Council:

"An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament:

"The term 'governor' shall mean the officer lawfully administering the government of any colony:

"The term 'letters patent' shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland."

Section 2. "Any colonial law (*l*), which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

This enactment does not interfere with the power of the colonial legislature to repeal as to the colony an Imperial Act passed prior to the formation of the colony, not expressly enacted to extend to the colony, but held to form part of the law of the colony; but it does

(*l*) In *Webb v. Outtrim*, [1907] A. C. 81, 88, the Judicial Committee said, "Every Act of the Victorian Council and Assembly requires the consent of the Crown, and when it is assented to it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorised are different. If, indeed, it was repugnant to the provisions of any Act of Parliament extending to the colony, it might be inoperative to the extent of its repugnancy (see the Colonial Laws Validity Act, 1865, *supra*), but with this exception no authority exists by which its validity can be questioned or impeached." This statement must be read subject to the comment that the Commonwealth of Australia Constitution Act, 1900, is an Imperial Act extending to Victoria. See also the remarks in this case of Lord Halsbury, p. 88, on the difference between the Australian and the United States federations.

prevent the repeal of imperial statutes expressly applied to the colony, or of Orders in Council under these Acts (*m*).

Section 3. "No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provision of some such Act of Parliament, order, or regulation as aforesaid."

In other words, the colonial legislature may pass valid laws repugnant to and directly or indirectly abrogating the common law or any statute which has been held to apply to the colony as part of the personal law of the colonists (*n*), and has not been expressly enacted by the Imperial Legislature to be applicable to the colony. The enactment excludes the application to colonial statutes of the criteria as to repugnancy which may be applied to bylaws or other statutory rules (*o*).

Section 4. "No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed, or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions (*p*) with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorising such governor to concur in passing or to assent to laws for the 'peace, order, and good government' (*q*) of such colony even though such instructions may be referred to in such letters patent or last-mentioned instrument".

Section 5. "Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full powers to make laws respecting the constitution, powers, and procedure of such legislature; provided

(*m*) See the Canada Copyright Act, 1875 (38 & 39 Vict. c. 53, Imp.); *Smiles v. Belford* (1877), 1 Upp. Can. App. R. 436.

(*n*) In *Harris v. Davies* (1885), 10 App. Cas. 279, it was held that the New South Wales Legislature had power to repeal s. 6 of 21 Jac. 1, c. 16, as to costs in slander. In the same State a law was passed in 1904 (Ancient Lights Act (No. 16)), to abrogate the English law as to prescription for ancient lights, which had been declared to apply to that State: see p. 453, *ante*.

(*o*) See pp. 299, *et seq. ante*.

(*p*) The instructions contained in letters patent are collected in the Statutory Rules and Orders Revised (edit. 1904), under the title of the colony concerned. As to these see Todd: Parliamentary Government in Colonies (3rd ed.), chap. iv, and the observations of Higginbotham, C.J., in *Chung Teeong Toy v. Musgrove* (1888), 14 Victoria L. R. 349, 373. In *McDonald v. Larkins* (1902), 22 N. Z. L. R. 668, a question arose as to the validity of a New Zealand Act (the Shipping and Seamen's Act Amendment Act, 1896). This Act had not been suspended for the signification of His Majesty's pleasure, under s. 736 of the Merchant Shipping Act, 1894, and was not disallowed within two years, under the New Zealand Constitution Act, 1852, s. 58, and its provisions were therefore in force.

(*q*) These words are used in Acts giving municipal corporations power to make bylaws.

that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony " (r).

By section 2 (2) of the Colonial Loans Act, 1899, Acts or Ordinances of the scheduled colonies, impairing the validity or priority of the charge of loans under the Act, are void unless the consent of the Secretary of State and the Treasury has been previously obtained.

Veto and disallowance. A colonial Act or Ordinance in certain cases, under the directions of an imperial statute (s), or under the letters patent instructing the governor (t), (i) may be reserved for the King's pleasure; or (ii) may be vetoed by the governor; or (iii) may be allowed by the governor with a suspensory clause; or (iv) may be subsequently disallowed by the King in Council, usually within a time limited by the instruments establishing the constitution (s).

In the first and third cases the statute does not come into force until the making of an Order in Council allowing it, or the lapse of the time limited for disallowance (u).

In the second case the Bill never takes effect as an Act (x).

In the fourth case it would seem that the Act takes effect until publication of the Order disallowing it (y), but subject to any other objections open as to its validity and disallowance, does not operate to annul private rights completely constituted under the annulled Act and founded upon transactions completed before the annulment (z).

In case of failure to reserve a colonial Act for the signification of

(r) See *Fielding v. Thomas*, [1896] A. C. 600; *Harnett v. Crick*, [1908] A. C. 470; *Att.-Gen. for N. S. W. v. Trethowan*, [1932] A. C. 526. Sec. 192 (1) of Seychelles Penal Code giving absolute privilege to statements made by a member in the legislative assembly of Seychelles does not infringe this section. *Chenard & Co. v. Arissol*, [1949] A. C. 127.

(s) E.g., Commonwealth of Australia Constitution Act, 1900, art. 74; and for form of reservation clauses, see s. 9 and arts. 59, 60, 74. As to reserving Bills affecting the constitutions of States of the Australian Commonwealth, see Australian States Constitution Act, 1907. As to reserving South African Bills, see South Africa Act, 1909, ss. 64—66. See generally Keith, chap. ii, and Halsbury's Laws of England (2nd ed.), vol. xi, p. 184.

(t) Those in force at the end of 1903 are collected in the Statutory Rules and Orders Revised (edit. 1904), under the title of the Colony. Those since issued are published in the annual volumes of Statutory Rules and Orders.

(u) Orders in Council sanctioning reserved Bills are printed in the Statutory Rules and Orders Revised (edit. 1904), and subsequent annual volumes of Statutory Rules and Orders, under the title of the possession to which they relate.

(x) This power of disallowance is equivalent to the exercise by procuration of the royal veto.

(y) *Clapper v. Lawrason* (1841), 6 Upp. Can. Q. B. (o.s.) 319 (while an Act of 1839 was in force but subsequently disallowed, the plaintiff had been convicted and fined. The fine was not paid and a warrant was issued but not executed till after publication of the disallowance. Held that the conviction and warrant were legal and defendants were not liable for arrest of the plaintiff as the Act ceased only on publication in the gazette).

(z) *Wilson v. Esquimaux & Nanaimo Ry. Co.*, [1922] 1 A. C. 202 (disallowance by Governor-General of Canada under ss. 56 and 90 of the British North America Act, 1867, of a Provincial Act under which a grant of land had been issued before the disallowance, does not invalidate the title of the grantee).

the King's pleasure, doubts have been raised as to the validity of such Acts, which have rendered it necessary in certain cases to pass confirming Acts (a).

Territorial limitations of Dominions and colonial legislation.

7. Colonial statutes in another important respect differ from imperial, in that they can have no extra-territorial effect even as to British subjects unless the power of extra-territorial legislation (b), or extra-territorial constraint (c), has been expressly or impliedly conceded to the colony by an imperial Act, or by Order in Council, charter, or proclamation. This power has now been conceded in full to Canada (of which Newfoundland is now a province (d)), South Africa and the Dominions in section 10 which may adopt section 3 of the Statute of Westminster, 1931, viz., New Zealand (see p. 467, ante) and can be acquired at any time by Australia, by adopting the provisions of the section (e).

A New South Wales Act made bigamy punishable in the colony "wheresoever the second marriage takes place." One Macleod was indicted and convicted in New South Wales for bigamy, his first marriage having taken place in New South Wales and the second in Missouri. On appeal to the Privy Council (f), the statute was explained as applying only to bigamy committed in New South Wales. "If their lordships construe the statute as it stands and upon the bare words, any person married to any other person who marries a second time anywhere in the habitable globe is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their lordships an impossible construction of the statute; the colony can have no such jurisdiction, and their lordships do not desire to attribute to the colonial legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations to see what would be the reasonable limitation to words so general." And after considering the limitations to be imposed in construing the enactment, the judgment continued: "If the wider construction had been applied to the statute, and it was

(a) See 26 & 27 Vict. c. 84; 28 & 29 Vict. c. 63, s. 7 (South Australia); 56 & 57 Vict. c. 72 (Australian Colonies); 1 Edw. 7, c. 29 (Australian Colonies); 7 Edw. 7, c. 7.

(b) See *Kingston v. Gadd* (1901), 27 Victoria L. R. 417, 429, 430, on the Australian Commonwealth Customs Act (No. 6 of 1901). Affd. *sub nom. Peninsular and Oriental Steam Navigation Co. v. Kingston*, [1903] A. C. 471.

(c) *Att.-Gen. for Canada v. Cain and Gilhula*, [1906] A. C. 542; see p. 466, ante.

(d) See p. 467, ante.

(e) The Statute of Westminster, 1931, ss. 3, 10 (Appendix C). See *Croft v. Dunphy*, [1933] A. C. 156 (P. C.), as to the doubt as to whether the provision is retrospective or not. "The question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future," Lord Macmillan at p. 167.

(f) *Macleod v. Att.-Gen. for New South Wales*, [1891] A. C. 455, 457, 458.

supposed that it was intended to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has more than once been quoted, *Extra territorium jus dicenti impune non paretur*, would be applicable to such a case." The construction adopted in this case was, *ut res magis valeat quam pereat*, to limit the operation of the statute to the territory of New South Wales, instead of declaring it wholly *ultra vires* and void, as upon the more obvious interpretation of its terms it clearly appeared to be (g). So a Dominion Legislature must be assumed not to legislate for matters outside its territorial jurisdiction e.g., the Legislature of Victoria presumably does not by statute affect extra-territorial rights in New Zealand (h). But in *Croft v. Dunphy* (i) it was held that seizure in 1929 of a vessel "hovering" within twelve miles of the Canadian coast was legal under the provisions of the Canadian Customs Act, notwithstanding the doctrine of extra-territoriality. Lord Macmillan said that once a topic of legislation was found to be one on which the Dominion Parliament might competently legislate, there was "no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State." There seems no constitutional objection to colonial legislation attaching in respect of persons doing certain acts outside the territory and afterwards coming within it (k). The validity of a Canadian law in similar form was considered in the case of *The Sections of the Criminal Code Relating to Bigamy* (l), where sections 275 and 276 of the Canadian Criminal Code, 1892, prescribing punishment for bigamy committed "in any part of the world" were held to be valid. A similar question arose in *The Canadian Prisoners' Case* (m), where a colonial legislature had made a pardon for treason conditional on banishment to Van Diemen's Land (Tasmania). The prisoners were, owing to difficulties of transport, taken by stages from Upper Canada to Quebec, thence to Liverpool where they were detained awaiting transport to their destination. The Court refused a writ of *habeas corpus* or to discharge the prisoners on the ground that they had assented to the condition of pardon even if it were unlawful. If lawful and the prisoners had not assented they could be tried for treason in England and any subject might detain them until dealt with according to law. And in *Att.-Gen. for Canada v. Cain and Gilhula* (n), the Judicial Committee

(g) As to veto on attempts at extra-territorial legislation, see Todd: *Parliamentary Government in British Colonies* (2nd ed.), 177; Lefroy: *Legislative Power in Canada*, p. 338, n.

(h) *Mount Albert B. C. v. Australian Temperance and General Mutual Life Assn. Ltd.*, [1938] A. C. 224.

(i) [1933] A. C. 156, 163.

(k) *Kingston v. Gadd* (1901), 27 Victoria L. R. 417, *affd. sub nom. Peninsular and Oriental Steam Navigation Co. v. Kingston*, [1903] A. C. 471.

(l) (1897), 27 Canada 461.

(m) (1839), 3 St. Tr. (N.S.) 963.

(n) [1906] A. C. 542.

decided that the Dominion Parliament had, constitutionally, power to impose extra-territorial restraint for the purpose of making effectual a statute for preventing the importation of alien contract labour. In *Harrison v. McGrath (o)* however it was held that the New Zealand Gaming and Lotteries Act of 1881 could apply only to lotteries established or commenced in New Zealand. In *Re Coutts (p)* the question was raised but not decided whether a colonial legislature could make a law rendering residence abroad an offence.

It has not been judicially determined whether the Territorial Waters Jurisdiction Act, 1878, operates to empower a colonial legislature to legislate for its territorial waters (*q*).

Death Duties. It has also been necessary to consider this territorial limitation in deciding questions which have arisen as to the property to be treated as subject to a colonial Act imposing death duties. Ordinarily such Acts are read as applying only to assets as to which the colonial probate is needed to give title to executors or successors, or to assets within the colony (*r*). The imperial Acts on the subject do not authorise any proceedings to charge death duties on any property while situated in a British possession, or proceedings for their recovery in British possessions (*s*).

In *Blackwood v. R. (i)* it was decided that "personal estate" (in the New South Wales Stamp Duties Act of 1880, s. 16), must be read as limited to such estate as the colonial grant of probate conferred jurisdiction to administer—i.e., to *bona notabilia* within the colony as to which alone by virtue of the Charter of Justice granted under 4 Geo. 4, c. 96, the Supreme Court of the Colony can grant probate (*u*).

In Canada the powers of the Provinces are limited to "Direct Taxation within the Provinces," so no Province may tax property outside its territory, though it may tax persons domiciled or resident within the Province in respect of that property. The maxim *mobilia sequuntur personam* does not apply so as to cause to be within the Province property which is not otherwise legally situate there. The

(o) (1903), 22 N. Z. L. R. 676. See now Gaming and Lotteries Act Amendment Act, 1907, and *Jacobs v. Doyle*, [1935] N. Z. L. R. 534, 544, following *Harrison v. McGrath (supra)*; *New Zealand Newspapers, Ltd. v. Richardson*, [1948] N. Z. L. R. 270, 273.

(p) (1902), 22 N. Z. L. R. 203.

(q) See Jenkyns: *British Rule, etc., beyond the Seas*, p. 12, *n*. Oppenheim *International Law* (6th ed.), 1947, pp. 44, 448, 464.

(r) *Walsh v. R.*, [1894] A. C. 144 (debts out of Queensland charged on property in Queensland); *Henty v. R.*, [1896] A. C. 567 (foreign assets of testator domiciled in Victoria to which Victorian probate gave no title need not be disclosed); *Harding v. Commissioners of Stamps*, [1898] A. C. 769, 773 (Queensland Act does not include movables locally situated in Queensland belonging to a testator who was domiciled in Victoria). "The result of the cases is in effect that the province can tax either because the property in question is physically within the territory, or because the recipient of a part thereof is within its control": Keith's *Constitutional Law of the British Dominions*, 1933, p. 331.

(s) Finance Act, 1894, s. 20.

(i) (1883), 8 App. Cas. 82.

(u) See p. 424, *ante*.

maxim applies to the devolution of personal property and not to its local situation (x).

And as to matters in respect of which a Provincial Legislature is competent to impose obligations in respect of acts done outside the Province on persons domiciled within its jurisdiction, there is a presumption that legislation conferring special remedies for offences or quasi offences is confined as regards its operation to things done within the jurisdiction of the Legislature, and an Act of the Legislature will be so construed unless there is anything in it sufficient to displace that construction. So where a special and personal statutory remedy by means of action for damages for the death of a person caused by negligence was given by the Civil Code of Lower Canada and the widow sued in Quebec, it was held that this remedy was not applicable where the death was caused by negligence in Ontario, where the husband could have been precluded from suing by his contract (travelling at a reduced fare under special contract as to company's liability) (y).

The prerogative of the Crown.

8. The question has been raised whether a legislative body in what was formerly British India or in a colony has power by legislation to affect the prerogative of the Crown. This question so far as concerns the Madras Legislature under British rule was very fully discussed in *Bell v. Madras City Municipal Commrs.* (z). It would seem to flow from the decision in *Att.-Gen. of Canada v. Cain and Gilhula* (a), that any power or prerogative of the Crown may be delegated or transferred "to the governor or the government of one of the colonies, either by a Royal Proclamation which has the force of a statute (b), or by a statute of the Imperial Parliament, or by the statute of a local Parliament, to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them" (c). But as to each possession

(x) *Provincial Treasurer of Alberta v. Kerr*, [1933] A. C. 710. This case together with *Cotton v. R.*, [1914] A. C. 76, followed in *Burland v. R.*, [1922] 1 A. C. 215, cover the question of the extent of provincial power to impose death duties. Both these cases, *Cotton v. R.* and *Burland v. R.*, were concerned with the question of "direct taxation" in the Province of Quebec.

(y) *Canadian Pacific Ry. v. Parent*, [1917] A. C. 195.

(z) (1901), Ind. L. R. 25 Madras 457. Bhashyam Ayyangar, J., in holding that the prerogative could be thus affected there (pp. 476—480), differed from the view expressed in Ilbert: Government of India (1st ed.), 223, 226. Cf. *Hari v. Secretary of State for India* (1903), Ind. L. R. 27 Bombay 425. See also p. 463, *ante*.

(a) [1906] A. C. 542, 546.

(b) *Campbell v. Hall* (1774), 1 Cowp. 204.

(c) The following cases were cited as establishing these propositions: *Re Adam* (1837), 1 Moo. P. C. 460, 472—476; *Donegani v. Donegani* (1835), 3 Knapp 63, 88; *Cameron v. Kye* (1835), 3 Knapp 332, 343; *Jephson v. Riera* (1835), 3 Knapp 130, 3 St. Tr. (N.S.) 591.

it is necessary to examine the relevant statutes, orders and instructions, to see whether the particular prerogative has been surrendered, delegated, or put within the legislative control of the local Legislature.

Dominions having central and local Legislatures.

9. The task of the judiciary in dealing with colonial legislation is further complicated in the case of colonies or possessions having more than one Legislature.

In the case of Canada, Australia, and South Africa there are, and in British India there were, both central and local Legislatures; and the Courts may have to determine the constitutional limits of the powers of such bodies, whether *inter se* or under the imperial constitution which created them. And in these cases there has grown up a body of judicial decisions on the validity of statutes passed by the central Legislatures of each of these Dominions and of its constituent States and Provinces, which resembles that already existing in the United States.

India. The Legislatures of India were created under British rule by a series of statutes and charters collected in Ilbert's Government of India (*d*). The constitutional effect of this legislation is stated in *R. v. Burah* (*e*). The Colonial Laws Validity Act, 1865 (*f*), does not apply to Indian statutes.

Up to 1937 cases were not numerous in which the validity of Indian legislation had come in question; and the only important question which arose was as to the extent of the powers of the Viceroy's Council, or a Provincial Council, to affect the prerogative of the Crown by legislation. This question was very fully considered by the High Court of Madras in *Bell v. Madras City Commissioners* (*g*), where the question in debate was whether a Madras Act authorising the levy of certain tolls authorised the levy of tolls on goods the property of the Crown and was valid. In that case Bhashyam Ayyangar, J., in affirming the validity of the Act, examined exhaustively the constitution of the Madras Council, the decisions on the constitutional points raised, and the history of Indian legislation on the subject.

The general principle established was that no Indian Legislature could override the Imperial Acts from which its authority was derived, or Imperial Acts specifically relating to India.

By the Government of India Act, 1919, great changes were made in the constitution of the Indian Empire. This Act introduced "dyarchy." The Government of India Act, 1935, provided for a Federation

(*d*) (3rd ed.), Oxford, 1915, pp. 228—235. See also the Indian Councils Act, 1909; the Government of India Act, 1915 (a consolidation); the Government of India Act, 1919, and the Government of India Act, 1935; Cowell, Courts and Legislative Authorities in India.

(*e*) (1878) 3 App. Cas. 889; see p. 464, *ante*.

(*f*) See p. 467, *ante*.

(*g*) See p. 474, *ante*.

of Provinces and Native States with a wide extension of responsible government and for a separate constitution for Burma, but there was practically no power of constitutional amendment. The Federal Legislature alone might make laws upon certain subjects, and the Provincial Legislatures upon certain other subjects; while upon still other subjects the Federation and the Provinces had concurrent powers of legislation, the Federal legislation prevailing in case of conflict unless the Provincial law had been reserved and received the assent of the Governor-General (h).

Decisions of the British Courts on the constitution of India may still be for some time of importance, but will become increasingly academic. The Federation of the Indian Provinces and States was not effected under the Act of 1935, although the Federal Court was established in 1937, and functioned as a British Court until 1947, when by the Indian Independence Act of that year the Dominion of India and the Dominion of Pakistan were constituted and the British ceased to rule in the sub-continent. India became a "sovereign democratic republic" on January 26, 1950, with a constitution based on the Canadian model. India recognises the King as Head of the Commonwealth and by agreement with the Commonwealth Prime Ministers remains a full member of the British Commonwealth (i). The powers of the Federal Court, which still functions in India, are contained in sections 204–208 of the Act of 1935 (j). There are many instances in the reported cases in which the Federal Court was called upon to interpret the Constitution Act, *i.e.*, the Act of 1935 (k). Burma was separated from India by the Act of 1935, as already stated, and since January 6, 1948, by the Burma Independence Act, 1947, has become an independent country not forming part of His Majesty's Dominions nor entitled to his protection.

Canada. Under the British North America Acts, 1867 to 1949, questions have often arisen as to whether the Federal and Provincial Parliaments have exceeded their powers, or encroached on each other's functions. The general rules established are: "First, that there can be a domain in which the Dominion and Provincial Legislatures may overlap in which neither Legislature will be *ultra vires* if the field is clear; secondly, that if the field is not clear and in such a domain the two Legislatures meet, then the Dominion Legislature must prevail" (l). Legislation

(h) As to Indian Federation, see Keith's *Governments of the British Empire* (1935), pp. 553 *et seq.* (i) See p. 465, *ante*.

(j) See Eddy and Lawton, *India's New Constitution* (2nd ed.), pp. 161–173.

(k) *E.g.*, *Re Central Provinces and Berar Sales of Motor Spirit, etc.*, [1938] F. C. R. 18; *Validity of United Provinces Regularizations of Remissions Act*, [1938] [1940] F. C. R. 110; *Re Hindu Women's Rights to Property Act, 1937, and Hindu Women's Rights to Property (Amendment) Act, 1938*, [1941] F. C. R. 12; *Umayal v. Lakshmi Achi*, [1944] F. C. R. 1; *Basanta Chandra Ghose v. King Emperor*, [1945] F. C. R. 81; *Governor-General in Council v. Shiromani Sugar Mills Ltd.*, [1946] F. C. R. 40; *Pandit Sridhar Achari v. R.*, [1947] F. C. R. 193.

(l) *Grand Trunk Rail. Co. of Canada v. Att.-Gen. of Canada*, [1907] A. C. 65, 68, *Lord Dunedin*; *Compagnie Hydraulique de St. Francois v. Continental Heat and Light Co.*, [1909] A. C. 194.

of the Dominion Parliament so long as it strictly relates to the subjects set out in section 91 of the Act of 1867, is of paramount authority even though it trenches on matters assigned to the Provincial Legislatures under section 92 (m). This follows from the general scheme of the British North America Act, 1867, as explained by Lord Dunedin, and contrasted with that of the Commonwealth of Australia Constitution Acts in *Att.-Gen. for the Commonwealth of Australia v. Colonial Sugar Refining Co.* (n). The principle of the Australian Commonwealth is a federation in the strict sense, i.e., the federating States while agreeing to a delegation of part of their powers to a common government, preserve in other respects their individual constitutions unaltered. As Griffiths, C.J., said in *R. v. Barger* (o): "the scheme of the Australian Constitution like that of the United States of America is to confer certain definite powers on the Commonwealth and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth."

By section 91 of the British North America Act, 1867, a general power was given to the Parliament of Canada to make laws for the peace, order and good government of Canada without restriction to specific subjects and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures. Although it resulted from a treaty of union among the then existing Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their source (p).

The provincial powers given by section 92 are qualified by the Dominion powers enumerated in section 91, and any matter coming within section 91 is not to be deemed to come within section 92. With a view to preventing too rigid declarations of the Courts from interfering with such elasticity as is given in the Constitution, each case must be decided on its own merits; exhaustive definitions of the classes in the two sections cannot be given (q).

The distribution of legislative powers between the Dominion and

(m) *Tennant v. Union Bank of Canada*, [1894] A. C. 31, 45.

(n) [1914] A. C. 237, at pp. 253, 254, Viscount Haldane, L.C.

(o) (1907), 6 Australian C. L. R. 41, 67.

(p) As to giving leave to appeal from the Supreme Court of Canada, see *Clergue v. Murray*, [1903] A. C. 521, C. P. R. v. *Blain*, [1904] A. C. 453. As to the power of reference by the executive of Canada to the Supreme Court of Canada of questions as to the validity of legislation, see *Re Ontario Sunday Rest Bill* (1905), 35 Canada S. C. 581; *Att.-Gen. for Ontario v. Hamilton Street Ry.*, [1903] A. C. 524. In *Re Criminal Code Sections Relating to Bigamy* (1897), 27 Canada 461. These references are made under 54 & 55 Vict. c. 24, s. 4. By the British North America Act (No. 2), 1949 (12, 13 & 14 Geo. 6, c. 81), sec. 91 of the Act of 1867 is amended to extend the powers of the Canadian Parliament to amend the Constitution with certain limitations.

(q) *Proprietary Articles Trade Association v. Att.-Gen. for Canada*, [1931] A. C. 310, 316.

the Provinces in Canada (r), and between the Commonwealth and the States in Australia has given rise to questions of a complexity that can only be dealt with adequately in specialist treatises (s). "It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence of the Provincial Legislature, are necessarily incidental to the effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in section 91" (t). To illustrate, one of the powers of the Dominion is "the regulation of trade and commerce," but the Provinces can regulate the liquor traffic by a local licensing system (u); the Dominion cannot regulate insurance business by the requirement of a federal licence (x), nor require licences to be taken out for the operation of salmon canneries (y), nor effectually forbid a strike or lockout in the case of an industrial dispute (z), nor control prices (a) (except during an emergency such as war or famine (b)), though it can legislate for the punishment of persons taking part in combines to the injury or restraint of trade and commerce (c). On the other hand, it can regulate and control aeronautics and radio communications (d). In company matters, the Provinces have the power of incorporation of companies "with provincial objects," while the Dominion though not having an enumerated power of incorporation possesses it by reason of its residual power; the result apparently being that with regard to companies incorporated by the Dominion to deal with a matter especially entrusted to it by the British North America Act the Dominion can override provincial law (e) but the law of the Province

(r) *Att.-Gen. for Alberta v. Att.-Gen. for Canada*, [1939] A. C. 117, 129.

(s) See Lefroy's *Legislative Power in Canada* (Toronto, 1898); Clement's *Canadian Constitution* (1915); Lefroy's *Canada's Federal System* (Carswell Co., Ltd., Toronto, 1913), and his *Constitutional Law of Canada* (1918); Keith's *Constitutional Law of the British Dominions* (Macmillan & Co., 1933); Latham's *Australia and the British Commonwealth*, (1929); Kerr's *Law of the Australian Constitution*; "Thirty Years' Working of the Australian Constitution" (XV, Jo. Soc. Comp. Leg. (3rd series) p. 1); XL, L. Q. R. 202; 30 Harvard L. R. 595; and Keith's *Responsible Government in the Dominions* (Clarendon Press, 1928).

(t) *Att.-Gen. for Canada v. Att.-Gen. for Quebec*, [1947] A. C. 33, 43, per Lord Porter citing *Att.-Gen. for Canada v. Att.-Gen. for British Columbia*, [1930] A. C. 111, 118. Cf. *Att.-Gen. for Ontario v. Att.-Gen. for Dominion*, [1896] A. C. 348, 361, per Lord Watson; *C. P. Ry. v. Att.-Gen. for British Columbia*, [1950] A. C. 122, 140, per Lord Reid.

(u) *Hodge v. The Queen* (1883), 9 App. Cas. 117.
(x) *Att.-Gen. for Ontario v. Reciprocal Insurers*, [1924] A. C. 328; *Re Insurance Act of Canada*, [1932] A. C. 41.

(y) *Att.-Gen. for Canada v. Att.-Gen. for British Columbia*, [1930] A. C. 111, 118; cf. *Att.-Gen. for Canada v. Att.-Gen. for Quebec*, [1947] A. C. 33, 43, per Lord Porter.

(z) *Toronto Electric Commissioners v. Snider*, [1925] A. C. 396.

(a) *Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*, [1922] 1 A. C. 191.

(b) *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co., Ltd.*, [1923] A. C. 695.

(c) *Proprietary Articles Trade Ass. v. Att.-Gen. for Canada*, [1931] A. C. 310.

(d) *The Aeronautics Case*, [1932] A. C. 54; *Re The Regulation and Control of Radio Communication in Canada*, [1932] A. C. 304.

(e) *Toronto Corporation v. Bell Telephone Co of Canada*, [1905] A. C. 52; *Att.-Gen. for Canada v. C. P. Ry.*, [1906] A. C. 204.

will bind other Dominion companies, provided it does not sterilise their activities or deny their essential status or capacity, e.g., by forbidding them to trade or issue their capital, except when registered in the Province (f). The social credit legislation of Alberta (the Alberta Bill of Rights Act, 1946), was held *ultra vires* the Provincial Legislature as Part II of the Act (which could not be separated from the rest), was practically legislation on banking, a subject expressly reserved for the Dominion Parliament (g). The fact that "Marriage and Divorce" is enumerated among the subjects especially entrusted to the Dominion, whilst "The Solemnisation of Marriage in the Provinces" belongs to the Provinces, raises a nice question as to whether the Provinces can make parental consent a condition precedent to a valid marriage.

Australia. The Australian Constitution leaves to the States every existing power which is not exclusively vested in the Commonwealth or withdrawn from the States, but if the Commonwealth and the States have concurrent powers of legislation, that of the Commonwealth prevails (h).

In *Att.-Gen. for the Commonwealth of Australia v. Colonial Sugar Refining Co.* (i), the Judicial Committee examined the scheme of the Act of 1900 which established the Commonwealth Parliament, and held that the Constitution is federal on the principle established by the United States in preference to that chosen by Canada. Accordingly when a question arises as to whether it is competent to the Commonwealth Parliament to pass any Acts, "the burden rests on those who affirm that the capacity to pass those Acts was put within the powers of the Commonwealth Parliament to shew that this was done" (k).

In Australia, the provision in section 92 of the Constitution for absolute freedom of trade between the States has given rise to decisions that are not easily reconcilable. In *James v. Commonwealth* (l), it was held by the High Court that the section protects inter-State trade against State interference but does not affect the legislative power of the Commonwealth. So the validity of Federal Acts or regulations made thereunder cannot be attacked on the ground of interference with inter-State trade and commerce. The High Court has held that a State can acquire for His Majesty by purchase the whole wheat crop and hold it for sale (m), while the Privy Council has held that a State

(f) *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91; *Att.-Gen. for Manitoba v. Att.-Gen. for Canada*, [1929] A. C. 260; distinguished in *Lymburn v. Mayland*, [1932] A. C. 318.

(g) *Att.-Gen. for Alberta v. Att.-Gen. for Canada*, [1947] A. C. 503.

(h) See the Commonwealth of Australia Act, 1900, ss. 107 and 109, and p. 477, *ante*.

(i) [1914] A. C. 237.

(k) *Ib.*, p. 255.

(l) (1928), 41 Australian C. L. R. 442.

(m) *N. S. W. v. Commonwealth* (1915), 20 C. L. R. 54. Cf. *Peanut Board v. Rockhampton Harbour Board* (1933), 48 Australian C. L. R. 266.

cannot compulsorily acquire certain quantities of dried fruit in an attempt to regulate the sale of that commodity throughout Australia as it involves interference with inter-State trading contrary to section 92 of the Commonwealth Constitution Act (*n*). For difficulties as to conciliation and arbitration, see *Australian Railways Union v. Victorian Railways Commissioners* (*o*). In *Commonwealth v. S. Australia* (*p*), a taxing Act on motor spirit of South Australia was held invalid as violating section 90 of the Constitution enacting that on the imposition of uniform duties of customs, the power of the Dominion Parliament to levy excise shall become exclusive. The Act also violated section 92. On the other hand an Act to exclude infected animals from a State did not infringe section 92, *Ex p. Nelson* (*q*). As to the control of shipping, in *Newcastle and Hunter River S.S. Co. v. Att.-Gen. for the Commonwealth* (*r*), it was held *ultra vires* the Commonwealth Parliament to prescribe rules and regulations for ships solely engaged in the domestic trade and commerce of a State. The power of the Commonwealth Parliament was confined to dealing with shipping engaged in inter-State or foreign trade.

South Africa. In South Africa, the legislation of the Union is paramount, so questions of competence do not arise.

Rules for the interpretation of written Constitutions.

10. The general rules adopted for construing a written Constitution embodied in a statute are the same as for construing any other statute (*s*). In *D'Emden v. Pedder* (*t*) it was laid down by the High Court of Australia that where the Constitution Act contained provisions undistinguishable in substance, though varying in form, from provisions in the Constitution of the United States, which had received judicial interpretation by the Supreme Court of the United States, it was proper to consult and to treat as a welcome aid, but not as an infallible guide, the relevant decisions of that Court. In that

(*n*) *James v. Cowan* [1932], A. C. 542. Cf. *Commonwealth of Australia v. Bank of N. S. W.*, [1950] A. C. 235, where s. 46 of the Banking Act, 1947, was held invalid.

(*o*) (1930), 44 C. L. R. 319, (the question was whether railways owned by States came within the conciliation and arbitration power in s. 51 (xxv) of the Constitution), following *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920), 28 Australian C. L. R. 129. See also *Amalgamated Clothing and Allied T. U. of Australia v. D. E. Arnall & Sons* (1929), 43 Australian C. L. R. 29, (award *ultra vires*). Cf. *Anthony Hordern & Sons Ltd. v. Amalgamated Clothing & Allied T. U. of Australia* (1932), 47 Australian C. L. R. 1; *Pidoto v. Victoria* (1943), 68 Australian C. L. R. 87.

(*p*) (1926), 38 Australian C. L. R. 408, folld. *John Fairfax & Sons Ltd. v. N. S. W.* (1927), 39 Australian C. L. R. 139.

(*q*) (1928), 42 Australian C. L. R. 209. Cf. *Huddart Parker & Co. v. Commonwealth* (1931), 44 Australian C. L. R. 492; *Victorian Stevedoring etc. Proprietary Ltd. v. Dignan* (1931), 46 Australian C. L. R. 73.

(*r*) (1921), 29 C. L. R. 357.

(*s*) See *Federated Saw Mill Employés v. James Moore & Son* (1908), 8 Australian C. L. R. 465, 486, Griffith, C.J. (applying rules in *Heydon's Case*).

(*t*) (1904), 1 Australian C. L. R. 91, 111—117. Cf. *Webb v. Outrim*, [1907] A. C. 81, 92.

case the High Court followed a judgment of Marshall, C.J., in *McCulloch v. Maryland* (u), on the fundamental relations between the American Union and its constituent States. In *Bank of Toronto v. Lambe* (x), on the construction of the British North America Act, 1867, the Judicial Committee admitted the value and authority of *McCulloch's Case*, but considered that it was "impossible to argue from one case to the other" and that it threw no light on the question there raised, viz., whether certain taxation was direct taxation. In *Webb v. Outrim* (y), the Judicial Committee considered that the difference between the Federal Constitution of the United States and the Commonwealth and State Constitutions of Australia was too considerable to justify reliance on *McCulloch's Case* or similar United States cases and rejected this principle of interpretation (z). The decision in *D'Emden v. Pedder* (a) was to the effect that salaries of federal officers were exempt from State taxation and was based on the American doctrine that the operations of Federal instrumentalities in a State could not be hampered by State laws e.g., States cannot tax the officers, establishments and operations of the National Government. In 1907 a Commonwealth Act put an end to the power of the Supreme Courts of the States to deal with constitutional questions relating to the powers of the Dominion and the States *inter se*, so that henceforth there was no possibility of any conflict of authority. The decision was elaborately discussed in 1920 in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (b). It was there held that in so far as *D'Emden v. Pedder* held that, when a State attempts to give to its legislative or executive authority an operation which if valid would fetter, control or interfere with the free exercise of the legislative or executive powers of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent inoperative and invalid, it was sound. The basis of the decision in *D'Emden v. Pedder* was stated in the *Engineers' Case* (p. 157) to be "the supremacy of Commonwealth law over State law where they meet in any field" (c). Where the *Engineers' Case* differed from *D'Emden v. Pedder* was in deciding that (p. 159), "it is beyond any doubt that the doctrine of 'implied prohibition' (as to State interference) can no longer be permitted to sustain a contention and so far as any recorded decision rests upon it, that decision must be regarded as unsound." So in *Pirrie v. McFarlane* (*supra*), the defendant

(u) (1819), 4 Wheat. U. S. 316.

(x) (1887), 12 App. Cas. 575, 587.

(y) [1907] A. C. 81, 92.

(z) Up to 1920 most of the Judges of the Australian High Court did not accept the view of the Judicial Committee on this point. But see *Huddart Parker & Co. Proprietary Ltd. v. Moorehead* (1909), 8 Australian C. L. R. 355, 389, 391, *per* Isaacs, J.

(a) *Supra* at p. 116.

(b) (1920), 28 Australian C. L. R. 129, 146.

(c) *Pirrie v. McFarlane* (1925), 36 Australian C. L. R. 170, 180, 181, Knox, C.J., 213, Higgins, J.

was held to be unable "to derive any assistance from the doctrine of implied immunities of Federal instrumentalities nor can he rely on the decision in *D'Emden v. Pedder* unless he can establish that section 6 of the Victorian Motor Act is as applied to him inconsistent with a law of the Constitution." In that case a member of the Air Force was held liable under the Victorian Motor Car Act of 1915, for driving without a licence. Earlier in 1908 (*d*), the rule in *D'Emden v. Pedder* applied in *Federated Amalgamated Government Railway & Tramway Service Assocn. v. N. S. W. Railway Traffic Employers' Assocn.* (*e*) was held to have no application to a power conferred on the Commonwealth in express terms and which by their nature manifestly involve control of some operation of the State Government such as the power to make laws with regard to trade and commerce with other countries and with respect to taxation. The decisions in *D'Emden v. Pedder* and the *Engineers' Case* were analysed by Evatt, J., in *West v. Commissioner of Taxation (N. S. W.)* (*f*). And more recently by Latham, C.J., (*g*) where he said: "In the *Engineers' Case* the rule in *D'Emden v. Pedder* distinctly stated as a limitation upon the exercise of the powers of the States only, was held to be sound on the basis of section 109 of the Constitution which provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid'."

In the case of the British North America Act, 1867, it has been suggested that as the Act was founded on resolutions passed at Quebec by delegates of the subsequently federated colonies, terms adopted textually therefrom should be interpreted by the light of Canadian legislation up to that date, so as to determine the meaning of municipal institutions in section 91 of the Act; but the Judicial Committee, while examining the prior legislation on the particular subject-matter in question before them, appear to have considered the legislation of the federated provinces too diverse in its treatment of municipal institutions to justify the mode of interpretation proposed (*h*).

The Constitution of the Australian Commonwealth has been construed as an Act of Parliament, which it is, and not by reference to theories of abstract justice or of policy; but in such an interpretation it may be necessary to keep in mind that it is not a code going into minute detail as to the means by which federation is to be carried into effect by the Sovereign power created by it. "It is however always a question of construction whether we are called upon to construe

(*d*) *Att.-Gen. of N. S. W. v. Collector of Customs for N. S. W.* (1908), 5 Australian C. L. R. 818, 833, 842.

(*e*) (1906), 4 Australian C. L. R. 488.

(*f*) (1937), 56 Australian C. L. R. 657, 688, 696.

(*g*) *South Australia v. Commonwealth* (1942), 65 Australian C. L. R. 373; cf. *Carter v. Egg & Egg Pulp Marketing Board* (1942), 66 Australian C. L. R. 557, 573, Latham, C.J., and the same learned Judge in *City of Melbourne v. Commonwealth* (1947), 74 Australian C. L. R. 31 at p. 55.

(*h*) *Att.-Gen. for Ontario v. Att.-Gen. for Canada*, [1896] A. C. 348, 351.

the terms of a section or to decide whether powers are necessary to be implied in addition to those which are expressed. The same rules of interpretation apply that apply to any other written document " (i). And the High Court of Australia has declined to permit reference to debates in the constitutional conventions which resulted in the preparation of the draft constitution submitted for the approval of the Imperial Parliament, holding that these debates could not be prayed in aid in the interpretation of the Constitution (k). The same rule has been applied in Canada (l). In the *Aeronautics Case*, *Att.-Gen. for Canada v. Att.-Gen. for Ontario* (m) the necessity of not permitting the process of interpretation of the Constitution to dim or whittle down the terms of the original contract on which the Constitution was based is insisted upon.

But in Australia reference has been allowed, as a matter of the history of legislation, to the draft bills prepared under the legislative authority of the several States at their Convention in 1897, as an aid to the interpretation of the Constitution (o).

In *D'Emden v. Pedder* (p), it was laid down with reference to the Commonwealth Constitution—

(1) That the Commonwealth and the States are, with respect to the matters which under the Constitution are within the ambit of their respective legislative or executive authority, sovereign States, subject only to the restrictions imposed by the imperial connection and the provisions of the Constitution, whether express or implied (q). (See Art. 51 of the Constitution.) This is in accordance with what had been laid down in *Powell v. Apollo Candle Co.* (r) as to the powers of the New South Wales legislature.

(2) That consequently where the Constitution grants legislative or executive power to the Commonwealth, it may be exercised in absolute freedom, and without any interference or control whatever, except that prescribed by the Constitution.

(3) That as a further consequence, any exercise by a State of legislative or executive power which would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth is invalid unless expressly authorised by the Constitution (s).

(i) *Tasmania v. Commonwealth* (1904), 1 Australian C. L. R. 329, 338, 339, Griffith, C.J., but see the remarks in later cases *supra*.

(k) *Sydney Municipal Council v. Commonwealth* (1904), 1 Australian C. L. R. 208, 213. See p. 121, *ante*. (l) *Gosselin v. R.* (1903), 33 Canada 255, 264.

(m) [1932] A. C. 54, 70.

(o) *Tasmania v. Commonwealth and Victoria* (1904), 1 Australian C. L. R. 329, 350, Barton, J.

(p) (1904), 1 Australian C. L. R. 91. The case turned on a Tasmanian statute authorising the levy of a tax on receipts given by Commonwealth officers for their salaries.

(q) As to "implied prohibition" of State interference with Commonwealth instrument duties, cf. p. 481, *ante*.

(r) (1885), 10 App. Cas. 282. See p. 456, *ante*.

(s) See *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920), 28 C. L. R. 129 and p. 481, *ante*.

(4) That general words in a State Act should, where possible, be construed so that the application of the Act may not infringe the Commonwealth Constitution.

In *Colonial Sugar Refining Co. v. Irving (t)*, it was held by the Judicial Committee that the Commonwealth Excise Tariff Act of 1902 (No. 11), did not exceed the legislative powers given by Art. 90 of the Commonwealth Constitution Act, 1900, by imposing uniform excise duties before uniform customs duties had been imposed, and that an exemption contained in section 5 of the Tariff Act, which excepted goods on which customs or excise duties had been paid before October 8, 1901, was not such a discrimination between different States of the Commonwealth as is forbidden by Art. 51 of the Constitution Act. The fact that the Act operated unequally as between the States was not due to the action of the Commonwealth Parliament, but arose from the inequality of duties imposed by the individual States themselves.

In *Davies and Jones v. Western Australia (u)*, the Administration Act, 1903 (No. 13), of Western Australia was unsuccessfully challenged as invalid for imposing discriminating duties between persons *bona fide* residents of and domiciled in Western Australia, and persons resident in other States of the Commonwealth. It was held that the real ground of discrimination was domicile and not residence, and thus was not invalid under section 117 of the Constitution which applied to discrimination between residents of the different States.

In *Fox v. Robbins (x)*, a statute of Western Australia was held invalid in so far as it discriminated against wines manufactured from fruit grown in other States of the Commonwealth (Arts. 92, 113).

In *Kingston v. Gadd (y)*, it was held by the Supreme Court of Victoria that it would not assume that the provisions of a Commonwealth Act were *intra vires*, but would inquire into their validity by reference to the Constitution, and that unless they were made under the Constitution (z) they "should be rejected by the Courts and Judges of every State as invalid whenever any question arises as to their validity." In the particular case the Court held section 192 of the Commonwealth Customs Act (No. 6 of 1901) to be valid. But the High Court of the Commonwealth has declared certain Commonwealth enactments invalid. For instance, it has been held that Part VII of the Trade Marks Act of 1905, is an attempt to regulate the internal trade of States not within or incidental to any of the express powers conferred

(t) [1906] A. C. 360.

(u) (1904), 2 Australian C. L. R. 29.

(x) (1909), 8 Australian C. L. R. 115. Cf. *Peanut Board v. Rockhampton Harbour Board* (1933), 48 Australian C. L. R. 266.

(y) (1902), 27 Vict. L. R. 417, 428. Affd. *sub. nom. Peninsular Oriental Steam Navigation Co. v. Kingston*, [1903] A. C. 471.

(z) See p. 463, *supra*.

on the Commonwealth Parliament to regulate that trade and was consequently *ultra vires* (a).

In *Baxter v. Ah Way* (b), it was contended that section 52 (g) of the Commonwealth Customs Act (No. 6 of 1901), amounted to a delegation of legislative power, by the legislature to the Governor-General in Council and was invalid under Art. 51 (i) (ii) of the Constitution. The enactment provides that all goods the importation whereof shall be prohibited by proclamation shall be prohibited imports (c). The Court rejected the contention and held that the enactment was not a delegation of legislative power (d) but was an example of conditional legislation.

Interpretation of State Acts by Federal Courts. In *Bond v. Commonwealth of Australia* (e), Griffith, C.J., intimated that the High Court of Australia would be reluctant, as a general rule, to put a different construction upon the statutes of a State from that which the Supreme Court of a State had declared to be their true construction, unless its decision was directly invited by way of appeal, either from the same Court or from the Court of another State, on a case involving the construction of identical words.

Mandated Territories.

11. Mandated Territories are not parts of the British Empire, they are territories which were entrusted to the mandatory by the League of Nations after the war of 1914—18. In 1946, after the second world war, the United Nations Organisation set up a Trusteeship Council in connection with territories placed under the supervision of the United Nations. Trusteeship agreements were approved and these comprised, so far as the British Commonwealth is concerned, the same territories as those formerly entrusted by the League of Nations. By the Mandated and Trust Territories Act, 1947, "trust territory" means territory administered under the trusteeship system of the United Nations. The operation of Acts applicable to trust territory is to be the same as if the mandate of the League of Nations were being exercised (f). Power is reserved by this Act for His Majesty by Order in Council to make any modification in any

(a) *Att.-Gen. for N.S.W. v. Brewery Employés Union* (1908), 6 Australian C. L. R. 469; *Att.-Gen. for Victoria v. Commonwealth* (1935), 52 Australian C. L. R. 533; *Cf. R. v. Barger* (1907), 6 Australian C. L. R. 41 (Excise Tariff Act, 1906). *Huddart Parker & Co. Proprietary Ltd. v. Moorehead* (1909), 8 Australian C. L. R. 355. (Australian Industries Preservation Act). *James v. Commonwealth* (1928), 41 Australian C. L. R. 442; *Att.-Gen. for Victoria v. Commonwealth* (1945), 71 Australian C. L. R. 237 (Pharmaceutical Benefits Act, 1944); *City of Melbourne v. Commonwealth*, (1947), 74 Australian C. L. R. 31 (s. 48 Banking Act, 1945 invalid).

(b) (1909), 8 Australian C. L. R. 626; *Radio Corporation Proprietary Ltd. v. Commonwealth* (1938), 59 Australian C. L. R. 170.

(c) The Imperial Customs Act of 1876, and many colonial Customs Acts contain clauses in similar form.

(d) See p. 465, *ante*.

(e) (1903), 1 Australian C. L. R. 13, 23.

(f) For a list of Mandated and Trustee Territories see Whitaker's Almanack.

Act where a change in the responsible authority takes place. Every such Order in Council is to be laid before Parliament forthwith and if either House within 40 days of such laying resolves on an address for annulment no further proceedings may be taken. If an Order is revoked, it operates without prejudice to the validity of anything previously done under the Order or to the making of a new Order (g). The mandatory is sometimes the United Kingdom, *e.g.*, Palestine (from 1923 to 1948), Tanganyika, the British Cameroons, and Togoland. Sometimes a Dominion, *e.g.*, New Guinea to the Commonwealth of Australia, South-West Africa to the Union of South Africa, and Western Samoa to New Zealand. Nauru Island was mandated to the Empire and is administered by Great Britain, Australia and New Zealand, through an Administrator with all the powers of government including legislative power. The Crown legislates for territories mandated to the United Kingdom under the provisions of the Foreign Jurisdiction Acts, 1890 and 1913 (h). In the Dominions diverse views prevail. "In the case of Australia it was believed that the Crown might under section 122 of the Constitution, by according to the Commonwealth the mandate, enable it to exercise full authority, though the High Court seems rather to rely on the Imperial Act of 1919 approving the Treaty of Versailles" (i). The legislation is effected by the Governor-General in Council. In the Union of South Africa the mandate itself granted to the Crown to be exercised on its behalf by the Government of the Union is held to be sufficient to enable the Parliament of the Union to legislate. New Zealand was empowered to act by Orders in Council issued under the Foreign Jurisdiction Act and has given Western Samoa a Legislative Council controlled by the Administrator, which has powers of legislation subject to disallowance by the Governor-General.

(g) 11 Geo. 6, c. 8, s. 1 (1), (2), (6).

(h) See *Jerusalem-Jaffa District Governor v. Suleiman Murra*, [1926] A. C. 321, (an appeal from a mandated territory is competent under the Foreign Jurisdiction Act, 1890).

(i) Keith's *Constitutional Law of the British Dominions* (1933), p. 452 ff; and see generally that work; Oppenheim's *International Law* (6th ed.), 1947, vol. i, pp. 192-206, and *ibid.* p. 207 on Trustee Agreements; Anson, 1935, vol. ii, pt. ii, pp. 112-117; Keith's *Governments of the British Empire*, pp. 521 *et seq.*; Quincy Wright's *Mandates under the League of Nations* (1930); and 39 L. Q. R. 458. Halsbury's *Laws of England* (2nd ed.), vol. xi, pp. 56-58, 150-159; 245-247.

CHAPTER X

MISTAKES IN STATUTES

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Mistakes in printing, drafting or legislation.

1. *Causes of mistakes.* There are numerous mistakes in reference and mistakes of all kinds in Acts of Parliament (*a*), due either to the draftsman or the printer, or to the conjoint or adverse efforts of the two Houses of Parliament. The draftsman may mistake facts or may erroneously assume the law on any particular subject to be different from what it really is (*b*); and the printer may incorrectly reproduce the draftsman's manuscript, or mistakes may creep into a Bill during its passage through Parliament.

Part I of the first schedule to the Conveyancing and Law of Property Act, 1881, headed "Acts affected," and comprising a list of nine statutes relating to searches for judgments, Crown debts, etc., was referred to in section 5 of the Bill as originally drawn. That section failed to become law upon the passing of the Act, and the schedule of "Acts affected," which depended upon that section, although retained, is apparently in no way connected with the Act as it now stands. The mistake was corrected by section 2 of the Conveyancing and Law of Property Act, 1882 (*c*).

The converse case occurred in the Artisans and Labourers' Dwellings Act, 1875 (*d*), where section 22 (3) provided that loans for the purposes of the Act should be secured by a mortgage "in the form set forth in the third schedule hereto". There was no third schedule appended to the Act, and it was necessary to pass a supplementary Act of Parliament (43 Vict. c. 8), declaring that those

(*a*) See Parl. Pap. 1875—C—No. 208, p. 48; 32 & 33 Vict. c. 19, s. 4, refers to 6 & 7 Vict. c. 106, in error for 6 & 7 Will. 4, c. 106.

(*b*) See p. 26, *ante*.

(*c*) The schedule itself was repealed by Statute Law Revision Act, 1894.

(*d*) 38 & 39 Vict. c. 36.

words had been "inserted by mistake," and that the section should be construed and read as if those "words had not been inserted therein" (e).

Mistakes not to be assumed. In *Richards v. McBride* (f), section 3 of the Sunday Closing (Wales) Act, 1881, passed in August of that year enacted that the "Act shall commence and come into operation with respect to each division or place in Wales on the day next appointed for holding the general annual licensing meeting for that division or place." It was argued that the phrase meant "the next day appointed," the intention of the Legislature obviously being that the Act should come into force in the year 1881, whereas the words of the Act would delay its operation till 1882. It was held that the words "the day next appointed" meant the day which shall after the passing of the Act be next appointed for holding the meeting, Grove, J., referring to the argument that the words meant "the next day appointed," said: "No one, in construing a statute or any other literary production, could put such a construction upon the words unless by supposing they were a mistake. But we cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the Legislature to amend it."

Reference to original Acts to resolve doubts. Doubts as to the accuracy of the King's Printer's copies of statutes are settled so far as possible by reference to the original Acts or the vellum prints preserved in the House of Lords, which are usually treated as conclusive (g). In *Re Nott* (h), it was doubted whether the word "amend" in the printed copies of 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, was not an error. The Parliament roll was therefore examined and the print was found to be correct.

Misstatements of fact.

2. *Facts stated in preamble may be controverted.* With regard to an averment in the preamble of a statute, Lord Coke says (i): "By the authority of our author the rehearsal or preamble of a statute is to be taken for truth, for it cannot be thought that a statute that is made by authority of the whole realm, as well as of the King and of the Lords spiritual and temporal, and of all the Commons, will recite a thing against the truth." But this proposition is too wide to be

(e) And see *Jamaica Ry. v. Att.-Gen. of Jamaica*, [1893] A. C. 127.

(f) (1881), 8 Q. B. D. 119, 122. So also it cannot be assumed that there has been a dereliction of duty on the part of an official of Parliament. See *R. v. Irwin Printing Co. Ltd.*, [1926] Exch. Reports Canada, 104, 106 (Court cannot entertain any argument that there is a defect of Parliamentary procedure behind an Act); and *Halpin v. Att.-Gen.* (1935), 69 Irish L. T. R., 259 (failure to endorse date of passing). See the last-mentioned case, as to the effect of the omission of words of enactment.

(g) See pp. 35, 42, *ante*.

(h) (1843), 4 Q. B. 768; see also *R. v. Haslingfield* (1874), L. R. 9 Q. B. 203.

(i) Co. Litt. I. 196.

accepted as correct at the present day; and from the case of *Leicester v. Heydon* (k), it would appear doubtful whether the proposition was not too wide at the time it was made. It is clear that a recital in an Act of Parliament may be used as evidence, but it is not conclusive evidence, and it is liable to be rebutted (l).

But the erroneous declarations of the Legislature, though historically inconclusive as to the past, may create law as to the future, or may be prospectively, though not retrospectively, conclusive (m).

Recital in a public or private Act not conclusive. In *Merttens v. Hill* (n), Cozens-Hardy, J., said: "A mere recital in a local and personal Act of Parliament, though admissible against persons claiming under the Act, is not conclusive, and the Court is at liberty to consider the fact or the law to be different from the statement in the recital" (o). And in *R. v. Haughton (Inhabitants)* (p), Lord Campbell said in the course of the argument: "A recital in a private Act is not conclusive either in law or in fact, and this recital is merely evidence of the road being in Denton, and is therefore inadmissible against an estoppel." And in his judgment he added: "At most therefore it (the recital) may be considered evidence that the road is in Denton; but against the estoppel evidence cannot be admitted. Had there been anything amounting to an enactment that the road should be considered in Denton, that would have prevailed over the estoppel, but a mere recital in an Act of Parliament either of fact or law is not conclusive, and we are at liberty to consider the fact or the law to be different to the statement in the recital" (q). And in the *Wharton Peerage Claim* (r), in order to prove the relationship existing between different members of a certain family so as to substantiate part of the pedigree, a private Act of Parliament describing the relationship was tendered in evidence. Upon this the Lord Chancellor said: "It is very strong evidence, for it is the well-known practice of this House not to allow the insertion of such a statement in the recitals of a private Act unless

(k) (1572), 1 Plowd. 384 (cited in *Stead v. Carey* (1845), 14 L. J. C. P. 177, 182).

(l) See pp. 186, *et seq.* *ante*. In *Dwyer v. Port Arthur* (1893), 22 Canada S. C. 241, an erroneous recital was held to be ineffective.

(m) "This is an absolute statute by the Legislature that there was a seignurie of Murgan, even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to disregard its enactments. If a mistake has been made the Legislature alone can correct it" ; *Labrador Co. v. R.*, [1893] A. C. 104, 123, Lord Hennen.

(n) [1901] 1 Ch. 842, 852.

(o) See *Duke of Beaufort v. Smith* (1849), 4 Ex. 450, 470, Parke, B. (Private Acts inadmissible in evidence). In *Mills v. Mayor of Colchester* (1867), 36 L. J. C. P. 210, 214, Willes, J., said: "You cannot say the statute cannot be looked to, but. . . the cases which have been cited are authorities to show that what is stated in the statute is not to be taken as a proof of any matter of fact or law." See also Taylor: *Evidence* (12th ed.), s. 1660.

(p) (1852), 22 L. J. M. C. 89, 92, 94; *Mersey Docks & Harbour Board v. Cameron* (1864), 11 H. L. C. 443, 518, Lord Chelmsford.

(q) In *Edinburgh and Glasgow Ry. v. Linlithgow (Magistrates)* (1859), 3 Macq. H. L. (Sc.) 691, 704, Lord Campbell, L.C., said: "The recitals in a statute cannot bind those who are not within the enacting part."

(r) (1844), 12 Cl. & F. 295, 302.

the truth of that statement has been previously proved to the satisfaction of the Judges to whom the Bill was referred" (s).

Misstatements of law.

3. *Incorrect statement of law.* "That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the Legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the Legislature is an ideal person that does not make mistakes" (t).

"We ought in general," said Lord Blackburn in *Young v. Mayor, etc., of Leamington* (u), "in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law" (x). In other words, it is presumed that the Legislature has informed itself as to the state of the law on any subject as to which it undertakes to legislate; for example, if the Legislature amends a statute which has received a judicial interpretation, it is presumed that the Legislature was acquainted with that interpretation at the time it amended the statute (y). Thus, in *Mulcahy v. R.* (z), the Judges said that the Treason Act, 1796, "did in terms sanction and embody the received interpretation of the Statute of Treasons, with which it must be presumed that the Legislature was acquainted, and which it left undisturbed." More recently Swinfen Eady, J. in *Re Demerara Rubber Co. Ltd* (a), referring to the opinion of Jessel, M.R., in *Re Union Bank of Kingston-upon-Hull* (b) on sections 161 and 162 of the Companies Act, 1862, said: "A knowledge of the Judicial construction thus put on sections 161 and 162 of the Companies Act, 1862, must be imputed to the Legislature." And Lord Loreburn, L.C., in *North British Ry. v. Budhill Coal & Sandstone Co.* (c) said: "When an Act of Parliament uses a word which has received a judicial construction, it presumably

(s) In the *Shrewsbury Peerage Claim* (1857), 7 H. L. C. 1, 13, Lord St. Leonards said: "That used to be the practice, but it is not so now. The evidence in support of private Bills is not now submitted to and reported on by the Judges, and future recitals will not therefore be evidence." The practice only applied to private estate Bills: see 2 Clifford 769. The preambles of private Acts still have to be proved. cf. p. 187, *ante*.

(t) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 531, 549, Lord Halsbury, L.C.; and see p. 488, *ante*.

(u) (1883), 8 App. Cas. 517, 526.

(x) See also *R. v. Watford (Inhabitants)* (1846), 9 Q. B. 626, 635, Lord Denman, C.J.

(y) *London Clearing Bankers' Committee v. I. R. C.*, [1896] 1 Q. B. 222, 227, Wright, J. This is so even in technical matters, such as "the difference between the existing courses of practice in Bankruptcy and in Chancery"; *Kellock's Case* (1868), L. R. 3 Ch. App. 769, 781, Selwyn, L.J.

(z) (1868), L. R. 3 H. L. 306, 319.

(a) [1913] 1 Ch. 331, 335.

(b) (1880), 13 Ch. D. 808, 810.

(c) [1910] A. C. 116, 127.

uses it in the same sense." In *Barras v. Aberdeen Steam Trawling and Fishing Co. (d)*, Lord Buckmaster said: "It has long been a well-established principle when applied to the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear Judicial interpretation the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

Erroneous interpretations. But if it appears from the wording of an Act of Parliament that the Legislature was under some misapprehension as to the state of the law on a particular subject, such a misapprehension "would not," as was said by Cockburn, C.J., in *Earl of Shrewsbury v. Scott (e)*, "have the effect of making the law which the Legislature had erroneously assumed it to be." Thus, in *Mollwo, March & Co. v. Court of Wards (f)*, the Judicial Committee said: "Some reliance was placed on the 28 & 29 Vict. c. 86, s. 1 (g), which enacts that the advance of money to a firm upon a contract that the lender should receive a rate of interest varying with the profits, or a share of the profits, shall not of itself constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive, and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence" (h). So, too, in *Houghton v. Fear Brothers, Ltd. (i)*, a recital in an Act of Parliament that an earlier Act was a temporary Act only was held to be inaccurate, and not to conclude the Court from holding that not the whole Act should be continued for a further seven years but only those sections which were originally limited in duration to seven years. Pickford, J., said that the recital was a mistaken one, and therefore the enactment was based

(d) [1933] A. C. 402, 411.

(e) (1859), 29 L. J. C. P. 34, 53.

(f) (1872), L. R. 4 P. C. 419, 437.

(g) Now incorporated in s. 2 (1) (d) of the Partnership Act, 1890.

(h) The following *dicta* also bear out this principle. In *Ex p. Lloyd* (1851), 1 Sim. (N.S.) 248, 250, Lord Cranworth, V.-C., said "the Legislature it is said has spoken of such associations (provisionally registered companies) as 'companies'; but though the Legislature may declare the law by enactment yet they are not interpreters of the law, and Courts of justice are not bound by a mistake of the Legislature as to what the existing law is." Cf. *Dore v. Gray* (1788), 2 T. R. 358, 365, Ashurst, J. In *Hanson v. Metcalfe* (1866), L. R. 1 H. L. 242, 250, Lord Cranworth said: "No doubt the Legislature may have mistaken the law as to the effect of the former statute." In *Cambridge University v. Bryer* (1812), 16 East 317, 326, Le Blanc, J., said: "If the Court are clear in their construction of an Act, they are bound to give effect to that construction, although they should be of opinion that an erroneous construction has been put upon it by other Acts." In *Sewell v. Burdick* (1885), 10 App. Cas. 74, 105, Lord Bramwell pointed out two statements of law in the preamble of the Bills of Lading Act, 1855, which were, in his opinion, inaccurate.

(i) [1913] 2 K. B. 343, 352.

upon a mistake. "The draftsman was under the erroneous impression that the whole Act would expire at the end of seven years and acting upon that view he drafted the section so as to continue all the provisions of the earlier Act for a further term of seven years." In *Bristol Guardians v. Bristol Waterworks* (k) Lord Loreburn pointed out that owing to a draftsman's blunder the water company under its special Act of 1862 could charge what it pleased to certain workhouses. "A Court is not at liberty to make laws, however strongly it may feel that Parliament has overlooked some necessary provision or has even been overreached by the promoters of a private Bill" (l).

Enunciation in a statute of a proposition of law as evidence of the law. At the same time it must be borne in mind that if we find a rule of law enunciated in the preamble to a statute, or if it appears from the language of the statute that the Legislature has acted upon the idea that such a rule existed, it is very strong evidence of what the law on the subject actually is, though the Court is not absolutely bound by a recital, and, as was said by Lord Campbell in *R. v. Treasury* (m), "the burden of proving that the Legislature has fallen into a mistake is cast upon those who say so." Also, a rule of law may be sometimes found so distinctly recognised in a statutory enactment that to deny the existence of the rule of law would be in fact to abrogate the statute. Thus, in *Norton v. Spooner* (n), it was argued that an action for damages for crim. con. would not lie by the Roman-Dutch law prevailing in British Guiana. But it appeared that by a legislative Act of the colony, No. 22 of 1844, it was enacted that "whenever any action shall be brought . . . to procure reparation for pecuniary damages . . . for criminal conversation with any wife," certain formalities therein prescribed shall be observed as to the trial of such an action before a Judge and jury of twelve men. "Their lordships quite agree," said the Judicial Committee, "that the main object of this ordinance was to introduce and regulate the trial by jury, but when an Act of the Legislature declares that an action for a particular wrong shall be tried in a particular way . . . it appears to their lordships that it would be no less than monstrous to say that a cause of action thus recognised and provided for shall be treated as no cause of action at all. This goes far beyond a recital in an Act of legislation, which may . . . be often not conclusive. This is an express and distinct enactment, that if an action be brought for such a cause as that now under consideration . . . such and such shall be the consequences" (o).

(k) [1914] A.C. 379, 387.

(l) *Cape Brandy Syndicate v. I. R. C.*, [1921] 2 K. B. 403, 414, Lord Sterndale, M.R.; *Ormond Investment Co. v. Betts*, [1928] A. C. 143, 156, Lord Buckmaster; *Port of London Authority v. Canvey Island Commissioners*, [1932] 1 Ch. 446, 492. Lawrence, L.J.

(m) (1851), 20 L. J. Q. B. 305, 311.

(n) (1854), 9 Moore P. C. 103, 128.

(o) As to error in transcribing a statute, see *Yorke's Case* (1888), 15 Ont. Rep. 625, 629.

Correction of mistakes.

4. *Addition, alteration and rejection of words.* As a general rule (*p*) a Court of law is not authorised to supply a *casus omissus*, or to alter the language of a statute for the purpose of supplying a meaning, if the language used in the statute is incapable of one, even though they may be of opinion that a mistake has been made in drawing the Act (*q*). "Whether," said Jessel, M.R., in *Laird v. Briggs* (*r*), "we can alter the word 'convenient' in section 8 of the Prescription Act, 1832, by putting in the word 'easement' instead, is a question of very considerable difficulty. A Judge may take the view that section 8, as it stands, is so absurd that the word 'convenient' cannot stand there; but that does not quite conclude the question as to whether you can insert another word. All I wish to say is, that I think the question is open for discussion." He thought that "convenient" could be ignored as absurd in the context. In *Lyde v. Barnard* (*s*), the well-known hiatus in Lord Tenterden's Act, 9 Geo. 4, c. 17, s. 6 (no action shall be brought on a representation to the intent that a person "may obtain credit, goods or money upon," unless the representation is in writing) was debated. Lord Abinger said that the word "upon," "must be rejected as nonsensical"; but Parke, B., after observing that "the words of the clause were clearly inaccurate, probably through a mistake in the transcriber into the Parliamentary Roll," added, "We must make an alteration in order to complete the sense, and must either transpose some words or interpolate others." He thought the Court was at liberty to read the phrase by transposition as "may obtain goods or money upon credit" or that the words "such representations" might be supplied after the word "upon." Thus, in *Green v. Wood* (*t*), it was suggested that the words in section 2 of the Warrants of Attorney Act, 1822, "unless judgment shall have been signed or execution issued," should be read "unless judgment shall have been signed and execution levied," because the last three words, as they stood, were incapable of a meaning. "To give an effectual meaning," said Lord Denman, C.J., "we must alter not only 'or' into 'and,' but 'issued' into 'levied.' It is extremely probable that this would express what the Legislature meant, but we cannot supply it. Those who used the words thought that they effected the purpose intended." And Patteson, J., added: "It is clear to my mind that some mistake has occurred in drawing this Act, and we cannot hope to give a meaning to the whole. . . . But I do not think we should be justified in doing so

(*p*) See p. 67, *ante*.

(*q*) A curious mistake was made in the Customs Consolidation Act, 1876, for in s. 268 it was enacted that no action shall be commenced against a coastguard officer until one month next after notice in writing, but in s. 272 it was enacted that "every action against such officer shall be commenced within one month." Both sections were repealed by the Public Authorities Protection Act, 1893.

(*r*) (1881), 19 Ch. D. 22, 33, in the Court below (1880), 16 Ch. D. 440, Fry, J., read "easement" for "convenient."

(*s*) (1836), 1 M. & W. 101, 115, 123.

(*t*) (1845), 7 Q. B. 178, 185.

(i.e., making the alterations contended for). It is best to say that the words have no meaning at all."

Obvious misprints may be corrected. But if there is an obvious misprint in an Act of Parliament the Courts will not be bound by the letter of the Act, but will take care that its plain meaning is carried out. "It is our duty," said Tindal, C.J., in *Everett v. Wells* (u), "neither to add to nor to take away from a statute, unless we see good grounds for thinking that the Legislature intended something which it has failed precisely to express." Thus, in *Chancellor of Oxford v. Bishop of Coventry* (x), it was resolved that "when the description of a corporation in an Act of Parliament is such that the true corporation intended is apparent . . . though the name of the corporation is not precisely followed, yet the Act of Parliament shall take effect." So in *R. v. Wilcock* (y) the 58th Geo. 3, c. 51, in part repealed several Acts described by their titles and dates. Among these was an Act said to have been passed in the 13th Geo. 3, but agreeing in title with 17th Geo. 3, c. 56, and with no Act passed in 13th Geo. 3. Lord Denman, C.J., said: "Secondly, whether the penalty is properly distributed by the adjudication is assumed to depend on the question whether the Act just alluded to (17 Geo. 3, c. 56) was in these particulars repealed by the statute 58 Geo. 3, c. 51, which repeals 'an Act passed in the 13th year of' Geo. III, entitled 'an Act for,' etc., and here is set out the title of 17 Geo. 3, c. 56, not that of any Act passed in the 13th year of Geo. III, nor, as we presume, of any other Act whatever. A mistake has been committed by the Legislature; but having regard to the subject-matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal the Act of 17 Geo. 3, and that the incorrect year must be rejected" (z).

Correction by Officials of errors in Acts. When the royal assent is given by commission, the Bills to which the assent is to apply are specified in the commission by the statutory short titles given to them by clauses in the Bills. The effect of this appears to be that any error in the print of an Act so assented to can on discovery be corrected at any time, inasmuch as what is assented to is not a particular written or printed paper, but the Bill, the whole Bill, and nothing but the Bill; and if the statute is printed and circulated from any copy other than that which has passed between the Houses, the error can be set right. The first print issued of the Elementary Education Act, 1891, was withdrawn, and a new

(u) (1841), 2 M. & G. 269, 277. Cf. *R. v. Dowling* (1857), 8 E. & B. 605.

(x) (1615), 10 Co. Rep. 57 b.

(y) (1845), 7 Q. B. 317, 338. *Re Boothroyd* (1846), 15 M. & W. 1, 9, 10, 12.

(z) With regard to an obvious mistake in a will, Lord Brougham said in *Langston v. Langston* (1834), 2 Cl. & F. 194, 240: "Anyone who reads this will cannot doubt that some mistake must have happened, and that is a legitimate ground in construing an instrument, because that is a reason derived, not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself."

print issued (a). The competence of public officials to take this step depends on a question of fact, viz., whether the first issue was or was not printed from the proper copy. The printers and officials clearly have no power to alter in any way the copy assented to, and it is for the Judges or in the last resort for the Legislature, to correct the error.

Accidental omission in schedule may be corrected. An evidently accidental omission in the schedule to an Act may be supplied. By the Stamp Act, 1870 (b), sched., *sub. tit.* Voting Paper, "any instrument for the purpose of voting by any person entitled to vote at any meeting" was to be stamped with a ld. stamp. In *R. v. Strahan* (c), it was argued that the expression "at any meeting" included the assembling of the town council to elect aldermen, and that, consequently, all voting papers used at such elections must be stamped. But the Court held otherwise, on the ground that it could never have been the intention of the Legislature by such an enactment as this to alter the whole system of voting at public elections. "We must take it," said Cockburn, C.J., "that this schedule having been alphabetically arranged, instead of as in the former Act, there has been an *accidental omission* of some words of reference, such as the word 'such'."

(a) A similar course seems to have been taken with respect to the Companies Act, 1907: p. 44, n. (n) *ante*.

(b) 33 & 34 Vict. c. 97; superseded by the Stamp Act, 1891.

(c) (1872), L. R. 7 Q. B. 463, 465.

PART III

PENAL STATUTES

CHAPTER I

DEFINITION AND CONSTRUCTION OF PENAL ACTS

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Definition of a penal Act.

1. *Ambiguity of the term.* The term "penal statute," if employed without qualification, is ambiguous (*a*). Most, if not all, Acts containing a command or prohibition contain also some express penalty or sanction for disobedience to the command or prohibition which they contain, and where they are silent as to the sanction for disobedience to their commands or prohibitions the common law or the received rules of construction import into them the appropriate sanction—*i.e.*, where the disobedience affects the public interests, liability to indictment for misdemeanour (*b*); and where it affects private interests, liability to action by the person injured by the disobedience (*c*).

From the point of view of a pleader a penal statute is one upon which an action for penalties can be brought by a public officer, by a common informer (*cc*) (with or without the consent of the Attorney-General), or by a person aggrieved. But "penal Act" in its wider sense includes every statute creating an offence against the State, whatever the character of the penalty for the offence. And the expression "penal," as used in the international rule that "the Courts of no country execute the penal laws of another," applies "not only to prosecutions and sentences for crimes and misdemeanours but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other

(*a*) See *Huntington v. Attrill*, [1893] A. C. 150, for difference between a penal and remedial action, and see *Stanley v. Wharton* (1821), 9 Price 301, and Halsbury's Laws of England (2nd ed.), vol. xxxi, pp. 459, 703.

(*b*) *R. v. Hall*, [1891] 1 Q. B. 747, 753, 770, and p. 213 *ante*.

(*c*) See pp. 219, *et seq. ante*.

(*cc*) See note (*n*) p. 499, *post*.

municipal laws (*d*), and to all judgments for such penalties" (*e*). The English Courts will examine the terms of a foreign Act to see whether it is or is not a penal law, and in their examination will not be bound by the construction put upon the Act in the State to which it belongs (*f*); otherwise an English Court might be bound to enforce a foreign law which it deemed penal on the strength of foreign decisions that it was not penal. In *Lecouturier v. Rey* (*g*), the House of Lords held that the French law of associations was a penal law or law of police and order, and could not receive any extra-territorial recognition. "The Courts of this country will not recognise a disability, not amounting to a change of status, not known to our law" (*h*).

Causes of the ambiguity. The cause of the ambiguity is that statutes fall from the point of view of penalty or sanction into three, and not into two, classes, *viz.*:

- (1) Acts enforceable by criminal remedies;
- (2) Acts enforceable by civil remedies by way of damages;
- (3) Acts enforceable by civil remedies in the form of penalty, forfeiture, or disability.

Into the third class fall those now comparatively rare Acts in which the sanction for disobedience consists in the right to sue for a specific penalty by civil procedure, *i.e.*, by what is a penal action properly so called. The object of such statutes is punishment, and the sum recoverable thereunder, whether called penalty or damages, is not assessed with a view of compensating the plaintiff (*i*). These fall into two sub-divisions:

- (a) Actions by the Attorney-General or a public official;
- (b) Actions by persons aggrieved (*k*).

The right of a private prosecutor to proceed in a criminal case is theoretically a right to act for the Crown. The prosecutor (since the abolition of common law appeals) recovers nothing for himself by the prosecution, except in the case of offences under the Larceny Act, 1861 (*l*). The common informer procedure whereby in penal

(*d*) In *Sydney Municipal Council v. Bull*, [1907] 1 K. B. 7; the English Courts refused to enforce the payment of a municipal tax or charge imposed by an Act of New South Wales, as being a liability imposed by a foreign State solely for its own domestic purposes.

(*e*) *State of Wisconsin v. Pelican Insurance Society* (1887), 127 U. S. 265, 290, approved in *Huntington v. Attrill*, [1893] A. C. 150, 157.

(*f*) *Huntington v. Attrill*, *supra*.

(*g*) [1910] A. C. 262. Cf. *Re Selor's Trust*, [1902] 1 Ch. 488.

(*h*) *Worms v. De Valdor* (1880), 49 L. J. Ch. 261, Fry, J., on a French "prodigal."

(*i*) *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718, 725; and see *Saunders v. Well*, [1892] 2 Q. B. 321.

(*k*) As to the period of limitation for such actions, see 3 & 4 Will. 4, c. 42, s. 3, Civil Procedure Act, 1833; *Thomson v. Lord Clanmorris*, *supra*, and Limitation Act, 1939, s. 2 (5).

(*l*) See s. 100 of that Act as modified by s. 24 (2) of the Sale of Goods Act, 1893. Section 100 of the Act of 1861 was repealed and re-enacted in the Larceny Act, 1916, s. 45.

actions the common informer usually obtained by specific statutory provision the whole or part of the "blood-money" (*m*) has been abolished (*n*).

In 1776 Lord Mansfield in an action of debt to recover penalties under the 7 & 8 Wm. 3, c. 34, against bribery said: "Penal actions were never yet put under the head of criminal law or of crimes. To make this a criminal cause, the construction of the statute must be extended by equity. It is as much a civil action as an action for money had and received" (*o*). And in the well-known case of *Att.-Gen. v. Bradlaugh* (*p*), an information by the Attorney-General to recover penalties against the defendant for sitting and voting in the House of Commons without taking the oath, Brett, M.R., said: "The recovery of a penalty, if that is the only consequence, does not make the prohibited Act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment."

Proceedings of class (*c*) differ from ordinary civil actions only in that the sum recoverable is liquidated. They are not penal laws within the meaning of international law in that they are actions brought by a subject to enforce his own interest and the liability is imposed for the protection of his private rights (*q*).

The question whether an Act is or is not penal¹ is now in civil cases material for four reasons only:

- (1) With respect to discovery, inasmuch as equity (which now prevails) has dealt with such actions as so far criminal in their nature as to refuse to assist the plaintiff by interrogation of the defendant;
- (2) With respect to the need of leave of the Court to compromise an action brought on the statute;
- (3) With respect to venue, which in penal actions was usually local (*r*); and
- (4) With respect to the right of appeal; for if a penal action were held to be "a criminal cause or matter," no appeal would lie to the civil Court of Appeal (*s*).

(*m*) A term now used opprobriously, but surviving from the ancient Saxon law and the procedure by appeal. The Court will refuse to assist where "common informers were competing for penalties"; *Burnett v. Samuel* (1913), 29 T. L. R. 583, Scrutton, J.

(*n*) Common Informers Act, 1951 (14 & 15 Geo. 6, c. 39), s. 1.

(*o*) *Atcheson v. Everitt* (1775), 1 Cowp. 382, 391.

(*p*) (1885), 14 Q. B. D. 667, 687.

(*q*) *Huntington v. Attrill*, [1893] A. C. 150.

(*r*) Local venue in actions under statutes prior to 1875 was abolished by Ord. XXXVI, r. 1, of the Supreme Court Rules of 1875, and was not revived by the R. S. C., 1883: *Buckley v. Hull Docks Co.*, [1893] 2 Q. B. 93; and by the Public Authorities Protection Act, 1893, it is abolished as to all proceedings to which that Act applies.

(*s*) Supreme Court of Judicature Act, 1925, s. 31 (1) (a). *Ex p. Woodhall* (1888), 20 Q. B. D. 832; *R. v. Wiltshire JJ.*, [1912] 1 K. B. 566.

With reference to criminal law the question whether an Act is penal is material for the purpose of deciding whether disobedience to the Act is or is not a misdemeanour, but this question can only arise in the absence of a specific sanction in the Act itself. "It may I think be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment. . . . Now it is true that there are statutes which do not create an imperative and positive duty to the public but which only impose, as the result of non-compliance with the directions of the statute, a pecuniary loss on the individual who does not so comply. In such a case it is not the intention of the Legislature to make the disobedience of the law a misdemeanour, it is only the intention to provide that if the person does not comply with the directions of the statute he must submit to the penalty. In each case it is a question of the construction of the Act to see if that is what is meant" (t).

Rules for deciding whether an Act is penal. The following rules apply for deciding whether statutes are or are not to be deemed penal:

- (1) *Prima facie*, the imposition of a fine or penalty or forfeiture by a statute makes the procedure criminal (u). "Where a proceeding is one to enforce a penalty, or where a proceeding is one—not that *must* end in a penalty, because the decision may be in favour of the person against whom it is taken—but where the proceeding is of such a nature that it *may* result in a penalty, it is a penal proceeding" (x). Lord Fitzgerald, in *Bradlaugh v. Clarke* (y), thus laid down the rule to be deduced from the old authorities (z): "Where it is ordained by statute that for feissance, misfeissance, or non-feissance the offender shall forfeit a sum of money, and it is not expressed to whom he forfeits it, in all such cases the forfeiture shall be intended for the Queen, save in cases where the penalty is assessed as compensation to the party injured and a private individual cannot sue."

- (2) That the fine, penalty, or forfeiture is payable to an individual does not *per se* render the remedy civil (a).

(t) *R. v. Tyler*, [1891] 2 Q. B. 588, 592, 594, Bowen, L.J.; cf. *Att.-Gen. v. Radloff* (1854), 10 Ex. Ch. 84, 101, 102, Platt, B.; and pp. 213, 219, *ante*.

(u) *Mellor v. Denham* (1880), 5 Q. B. D. 467; *R. v. Whitchurch* (1881), 7 Q. B. D. 534; *R. v. Paget* (1881), 8 Q. B. D. 151, 157, Field, J.; *Ex p. Schofield*, [1891] 2 Q. B. 428.

(x) *Derby Corporation v. Derbyshire County Council*, [1897] A. C. 550, 552, Lord Herschell.

(y) (1882), 8 App. Cas. 354, 383.

(z) Bacon, Abr. tit. Prerogative, B. 10. Cf. *Llewellyn v. Vale of Glamorgan Ry.*, [1898] 1 Q. B. 473, on s. 53 of the Railways Clauses Consolidation Act, 1845, under which the penalties go in certain events to the road authority, in other cases to private owners.

(a) *R. v. Paget* (1881), 8 Q. B. D. 151, 157, following *Hearne v. Garton* (1859), 2 E. & E. 66. See *R. v. Tyler*, [1891] 2 Q. B. 588.

- (3) But where the penalty is recoverable by action of debt the remedy is civil. Even in this case the action may not be compromised without the leave of the Court (*b*), and a collusive action for penalties is both unlawful (*c*) and ineffectual (*d*).
- (4) In certain cases the penalty has been held to be in truth liquidated damages and not a penalty in the stricter sense (*e*). Where an Act imposes a penalty for its contravention, the question arises whether the penalty is inflicted by way of punishment or by way of compensation for the breach. If the former, the contravention is a criminal offence, and even if the sole remedy for the offence is the statutory penalty, the contravention is none the less criminal (*f*).
- (5) In certain other cases, the penalty being recoverable only by a person aggrieved, the action is deemed so far penal that discovery in aid of it is not permitted (*g*).
- (6) An Act may be remedial from one point of view and penal from another.

In *Stanley v. Wharton* (*h*), it was argued that section 3 of the Distress for Rent Act, 1737, which enacted that "if any person shall wilfully . . . assist any tenant in fraudulently conveying away or concealing any part of his goods, every person so offending shall forfeit and pay to the landlord . . . double the value of the goods . . . to be recovered by action of debt," was a penal Act. "But," said Graham, B., "this Act is clearly distinguishable from those Acts which impose penalties," and is "entirely and purely remedial." But in *Hobbs v. Hudson* (*i*), the same Act was held so far penal that discovery could not be obtained in an action brought upon it. In *Ex p. Pearson* (*k*), James, L.J., declined to treat section 6 of the Bankruptcy Act, 1869, dealing with fraudulent transfers, as a penal statute, and in *Derby Corporation v. Derbyshire County Council* (*l*), it was held that the Rivers Pollution Prevention Act, 1876, which created an offence, but authorised proceedings in a county court for an order to abstain from committing the offence, was, so far as the county court proceedings were concerned, not a penal statute.

Construction of penal Acts.

2. *Strict construction to be applied.* It is said that penal statutes

(*b*) See R. S. C., 1883, Ord. L, rr. 13, 14, 15.

(*c*) 4 Hen. 7, c. 20.

(*d*) *Girdlestone v. Brighton Aquarium Co.* (1878), 3 Ex. D. 137; affirmed (1879), 4 Ex. D. 107.

(*e*) See *Reeve v. Gibson*, [1891] 1 Q. B. 652, and 3 & 4 Wm. 4, c. 15, s. 2.

(*f*) *R. v. Tyler*, *supra*, at p. 598, Kay, L.J. Cf. *Musgrove v. Chung Teeong Toy*, [1891] A. C. 272.

(*g*) See the cases as to forfeiture discussed in *Earl of Mexborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111.

(*h*) (1821), 9 Price 301, 310.

(*i*) (1890), 25 Q. B. D. 232.

(*k*) (1873), L. R. 8 Ch. App. 667, 673.

(*l*) [1897] A. C. 550.

must be construed strictly. In *Tuck v. Priester* (m), Lord Esher, M.R., said with reference to section 6 of the Copyright Act, 1862: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction." "Unless penalties are imposed in clear terms they are not enforceable. Also where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive" (n). And Blackburn, J., said: "When the Legislature imposes a penalty, the words imposing it must be clear and distinct" (o). But this rule must be read as applicable, if at all, only to penalties of a quasi-public character, and not to Acts creating penalties for infractions of the general law which are in the nature of purely civil remedies (p). The rules laid down in *Heydon's Case* (q), for the construction of obscurely penned statutes, are there said to apply to "penal" as well as to other statutes. In *Att.-Gen. v. Sillem* (r), Pollock, C.B., said: "All the penal statutes there alluded to, and in all the places where that doctrine is to be met with, are statutes which create some disability or forfeiture; none of them are statutes creating a crime, and I think it is altogether a mistake to apply the resolutions in *Heydon's Case* to a criminal statute which creates a new offence. The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law." This rule is said to be "founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department, for it is the Legislature, not the Court, which is to define a crime and ordain its punishment" (s). As to enactments creating crimes, the rule was adopted *in favorem vite* in respect of treason and capital felonies and extended to misdemeanours. So penal statutes were strictly construed when many comparatively minor offences were formerly capital or rendered convicts liable to transportation.

The question was of more importance in days when there was a disposition to introduce that species of criminal equity (t) which led to the dissolution of the Court of Star Chamber. Blackstone lays

(m) (1887), 19 Q. B. D. 629, 638; followed in *Hildesheimer v. Faulkner*, [1901] 2 Ch. 552, 561.

(n) *Att.-Gen. v. Till*, [1910] A. C. 50, 51, Lord Loreburn, L.C.

(o) *Willis v. Thorp* (1875), L. R. 10 Q. B. 383, 386.

(p) See *Huntington v. Attrill*, [1893] A. C. 150.

(q) (1584), 3 Co. Rep. 8. *Ante*, p. 91.

(r) (1863), 2 H. & C. 431, 509.

(s) *U. S. v. Wilberger* (1820), 5 Wheaton (U. S.) 76, 95, Marshall, C.J.

(t) See pp. 95 *et seq. ante*. "Construction by the Equity" of a statute; and see Co. Litt. (edit. Thomas), vol. i, p. 29, note Q. Cf. *Brandling v. Barrington* (1827), 6 B. & C. 467, 475, Lord Tenterden, C.J.

down the rule thus (u): "The law of England does not allow of offences by construction, and no cases shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law." The doctrine upon which must be based the *ratio decidendi* of cases put upon constructive fraud (*viz.*, estoppel by conduct), constructive notice, or constructive trusts, is inapplicable to the interpretation of a statute, and especially inapplicable to enactments dealing with crime or imposing penalties. For there is no estoppel with relation to the construction of any instrument, though in particular cases the parties may be bound to adopt, for the purpose of regulating their rights or obligations under the instrument, a construction other than the true legal construction.

Relaxation of rule of strict construction. The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. "All modern Acts are framed with regard to equitable as well as legal principles" (x). "A hundred years ago," said the Court in *Lyons' Case* (y), "statutes were required to be perfectly precise, and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the Legislature." Therefore, "although the common distinction," as Pollock, C.B., said in *Nicholson v. Fields* (z), "taken between penal Acts and remedial Acts, that the former are to be construed strictly and the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a Judge," yet the distinction now means little more than "that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, forced construction, or equitable interpretation to exonerate parties plainly within their scope" (a). In *Stephenson v. Higginson* (b), the rule was thus stated by Lord Truro: "In construing an Act of Parliament, every word must be understood according to the legal meaning, unless it shall appear from the context

(u) 1 Bl. Comm. 88 (edit. Hargr.), note (37).

(x) *Edwards v. Edwards* (1876), 2 Ch. D. 291, 297, Mellish, L.J., quoted with approval by Lord Cozens-Hardy, M.R., in *Re Monolithic Building Co. Ltd.*, [1915] 1 Ch. 643, 665.

(y) (1858), Bell C. C. 38, 45.

(z) (1862), 7 H. & N. 810, 817. Cf. *Ex p. Mann* (1890), 11 N. S. W. Law Rep. 348, where this rule was applied to a revenue Act.

(a) Sedgwick: *Statutory Law* (2nd ed.), p. 282, cited in *Att.-Gen. v. Sillem* (1862), 2 H. & C. 431 at p. 531, by Bramwell, B., who there calls it "a passage in which good sense, force and propriety of language, are equally conspicuous, and which is amply borne out by the authorities, English and American, which are cited in support of it."

(b) (1852), 3 H. L. C. 638, 686. See 48 Harvard L. R. 748.

that the Legislature has used it in a popular or more enlarged sense. That is the general rule, but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear." In *Dickenson v. Fletcher* (c), Brett, J., put the rule thus: "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty." This principle of construction is thus accurately stated by Sedgwick (d): "The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the Courts inclining to mercy."

Where an enactment imposes a penalty for a criminal offence, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise on the construction of the enactment (e). "Where there is an enactment which may entail penal consequences, you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language" (f). On the other hand, as said by A. L. Smith, L.J., in *Llewellyn v. Vale of Glamorgan Ry.* (g), "when an Act (imposing a penalty) is open to two constructions, that construction ought to be adopted which is the more reasonable and the better calculated to give effect to the expressed intention, which in this case is that the penalty shall be paid." And while it is probably true that the principles of construction have been somewhat relaxed in formality in modern days, yet at the same time strictness of statement is still valuable, especially in a case where the result may be highly penal (h): and the procedure indicated by a penal Act must be closely followed (i).

Operation of statute not to be narrowed by strict construction. But penal statutes must never be construed so as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptation would comprehend. The Judicial Committee

(c) (1873), L. R. 9 C. P. 1, 7.

(d) Statutory Law (2nd ed.), p. 287, cited with approval by Bramwell, B., in *Foley v. Fletcher* (1858), 3 H. & N. 769 at p. 781.

(e) *London County Council v. Aylesbury Dairy Co.*, [1898] 1 Q. B. 106, 109, Wright, J. *R. v. Chapman*, [1931] 2 K. B. 606, 609, ambiguity in section 2 of the Criminal Law Amendment Act, 1922; accordingly held that the accused was entitled to the benefit of the doubt.

(f) *Rumball v. Schmidt* (1882), 8 Q. B. D. 603, 608, Huddleston, B.

(g) [1898] 1 Q. B. 473, 478.

(h) *Cotterill v. Lemprière* (1890), 24 Q. B. D. 634, 637, Coleridge, C.J.; cf. *R. v. Brittleton* (1884), 12 Q. B. D. 266, 268.

(i) See *Smith v. Wood* (1889), 24 Q. B. D. 23, 28.

in *The Gauntlet* (*k*) said: "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included (*l*), and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

When large enough words are used, a prohibition may be extended so as to apply to something which has come into existence since the passing of the Act. Thus, in *Graves v. Ashford* (*m*), it was held that the piracy of a picture by means of photography was within the Copyright Acts (*n*) passed for the protection of artists and engravers, although photography was an unknown art at the time those statutes were passed. But in *R. v. Smith* (*o*), the question arose whether a person could be convicted under section 91 of the Larceny Act, 1861, of receiving a chattel, "knowing the same to have been feloniously stolen," where the stealing of partnership property had been committed by a partner in a firm. The offence of larceny by a partner was not made felony until the passing of the Larceny Act, 1868; consequently the question was whether the Act of 1861 could be extended by implication so as to embrace an offence which was not felony at the time the Act was passed, and the Court held that it could not be so extended. This decision was approved and followed in *R. v. Streeter* (*p*), where it was held that a man jointly indicted with a married woman for receiving goods stolen by the woman from her husband was not liable to conviction under section 91 of the Act of 1861, because the larceny by the wife was not a felony at common law or under the Act of 1861, but was a new felony created by sections 12, 16 (*g*) of the Married Women's Property Act, 1882. In *R. v. Payne* a man indicted under similar circumstances was held liable as for a common

(*k*) (1872), L. R. 4 P. C. 184, 191.

(*l*) In *Jenkinson v. Thomas* (1790), 4 T. R. 665, 666, Lord Kenyon said: "We must not extend a penal law to other cases than those intended by the Legislature, even though we think they come within the mischief intended to be remedied."

(*m*) (1867), L. R. 2 C. P. 410; *Taylor v. Goodwin* (1879), 4 Q. B. D. 228; *Att.-Gen. v. Edison Telephone Co.* (1880), 6 Q. B. D. 244; *Postmaster-General v. National Telephone Co.*, [1907] 1 Ch. 621. Contrast *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1, 8.

(*n*) 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57.

(*o*) (1870), L. R. 1 C. C. R. 266.

(*p*) [1900] 2 Q. B. 601.

law misdemeanour (q). A conviction in such a case cannot however be upheld unless there is evidence to show that the money had been taken by the wife in such circumstances as would support a prosecution and conviction of her for stealing the money (r).

(q) [1906] 1 K. B. 97, and see *R. v. Garland*, [1910] 1 K. B. 154.

(r) *R. v. Creamer*, [1919] 1 K. B. 564.

CHAPTER II

EFFECT OF PENAL STATUTES

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Conditions precedent to enforcement.

1. (a) *Mens rea must be proved.* Subject to certain exceptions, it is essential, to make any person liable for disobeying a penal statute, that something more should be proved than the act or omission prohibited; *i.e.*, it must be shown that the act or omission was made with a particular motive or intention. This principle is shortly expressed by the maxim of law, *Actus non facit reum nisi mens sit rea*. Where the proceeding, whether civil or criminal in form, is for a statutory penalty, independent of the civil damage to an individual, it seems to be accepted as the general rule that if a person does an act in itself indifferent, it must be distinctly proved, before he can be said to have had "a guilty mind," that he did this indifferent act with a criminal intention (a); but, if the act which he does is in itself unlawful, then the person who does the act will be assumed to have had a criminal intention, and, if he fails to justify or excuse the doing of the act, the law will hold him to be guilty. This was clearly laid down by Lord Mansfield in *R. v. Woodfall* (b). "I told the jury," said he, "that where an act, in itself indifferent, becomes criminal, if done with a particular intent, there the intent must be proved and found; but when the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent." Similarly, in *R. v. Dixon* (c), Lord Ellenborough said "It is a universal principle that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the

(a) *Frailey v. Charlton*, [1920] 1 K. B. 147; *R. v. Shevill* (1923), 17 Cr. App. R. 97; *R. v. Stearne*, [1947] K. B. 997; *Younghusband v. Luftig*, [1949] 2 K. B. 354.

(b) (1770), 5 Burr. 2661, 2666.

(c) (1814), 3 M. & S. 11, 15.

intention is an inference of law resulting from the doing the act" (d). In *R. v. Hicklin* (e), it was held in conformity with this rule, that the publication of a pamphlet called the "Confessional Unmasked," which contained a quantity of obscene matter, was a misdemeanour within section 1 of the Obscene Publications Act, 1857, and was not justified or excused by the fact that it had been published solely for the purpose of exposing the iniquity of the confessional. "I do not think," said Blackburn, J., "that you could so construe this statute as to say that, whenever there is a wrongful act of this sort committed, you must take into consideration the intention and object of the party in committing it, and, if these are laudable, that that would justify the wrongful act." And in *Steele v. Brannan* (f), where the same question was at issue, Bovill, C.J., said: "The probable effect of the publication of this book being prejudicial to public morality and decency, the appellant must be taken to have intended the natural consequences of such publication, even though the book were published with the objects referred to by his counsel" (g).

In *Mogan v. Caldwell* (h), a seaman saved portions of his ship's rations and took them home. It was held that he could not be convicted of larceny without proof of *mens rea*, and a finding of *mens rea* could not be justified by proof that the seaman knew that the ship-owners disapproved of this practice.

In *R. v. Tolson* (i) a question arose whether a woman could be convicted of bigamy who had married a second time, believing in good faith and upon reasonable grounds, that the first husband was dead. The act charged fell within the very words of section 57 of the Offences against the Person Act, 1861, "whoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony," and the prisoner could not bring herself within the exception to the Act as her husband had not been continually absent for seven years last past. The Court were divided (nine to five) as to the proper answer to the question, and it became necessary to discuss the maxim, *Actus non facit reum nisi mens sit rea*, and to examine the decisions in which it has been applied, in order to extract some idea of its meaning and of its application to statutory offences. Cave, J., said (k): "At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat

(d) Cf. *Gayford v. Chouler*, [1898] 1 Q. B. 316, a case on s. 52 of the Malicious Damage Act, 1861.

(e) (1868), L. R. 3 Q. B. 360, 375.

(f) (1872), L. R. 7 C. P. 261, 267.

(g) For a full discussion of cases on *mens rea*, see *Walker v. Chapman*, [1904] Queensland State Rep. 330, 341-346, Chubb, J., and see 45 Harvard Law Review 974.

(h) (1919), 88 L. J. K. B. 1141

(i) (1889), 23 Q. B. D. 168.

(k) *Ibid.*, p. 181.

uncouth maxim, *Actus non facit reum nisi mens sit rea*. Honest and reasonable mistake stands, in fact, on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication" (l). Assuming the correctness of this view, the result reached by the learned Judge can be attained by reference to the ordinary rule of construction, viz., that a rule of the common law, whether as to substantive or objective law, is not abrogated by statute, except by express provision or necessary implication (m). In *Bank of N. S. W. v. Piper* (n), the Judicial Committee said: "It was strongly urged by the respondent's counsel that, in order to the constitution of a crime, whether common law or statutory, there must be *mens rea* on the part of the accused, and that he may avoid conviction by showing that such *mens* did not exist. That is a proposition which their lordships are not concerned to dispute; but the question whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend on different considerations. In cases where the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief by the accused of the existence of facts which, if true, would make the act charged against him innocent" (o).

Sir James Stephen, in *R. v. Tolson* (p), dealt with the question from another point of view: "My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase, *Non est reus nisi mens sit rea*. Though the phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading on the following grounds:—It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as *mens rea*, or guilty mind, which is always expressly or by implication involved in every definition. . . . To an unlegal mind it suggests that, by the law of England, no act is a crime

(l) This rule is substantially that laid down by Brett, J., in *R. v. Prince* (1875), L. R. 2 C. C. R. 154, 169, and adopted by Stephen, J., in *R. v. Tolson* (1889), 23 Q. B. D. 168 at p. 190. In *R. v. Wheat*, [1921] 2 K. B. 119, 126, it was said that the principle was stated too widely by Cave, J., and moreover was not necessary for the decision. The statute 24 & 25 Vict. c. 100, s. 57, is an absolute prohibition admitting of only the three exceptions stated therein.

(m) See pp. 309 *et seq.*, ante.

(n) [1897] A. C. 383, 389.

(o) As to this see *Williamson v. Norris*, [1899] 1 Q. B. 7, where it was held that a servant of the Kitchen Committee of the House of Commons could not be convicted of selling liquor contrary to s. 3 of the Licensing Act, 1872, it being found that he merely acted under orders of the Committee. This enactment is superseded by s. 65 of the Licensing Act, 1910.

(p) (1889), 23 Q. B. D. 168, 185, 187.

which is done from laudable motives—in other words, that immorality is essential to crime.” After discussing the history of the phrase, he continued: “The principle involved appears to me, when fully considered, to amount to no more than this. The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed. Or again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition (q). Crimes are at the present day far more accurately defined, by statute or otherwise, than they formerly were. The mental element of most crimes is marked by one of the words ‘maliciously,’ ‘fraudulently,’ ‘negligently,’ or ‘knowingly.’ But it is the general—I might, I think, say the invariable—practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kind of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined.”

In *Coppen v. Moore*, No. 2 (r), Lord Russell of Killowen, C.J., said: “The appellant’s contention was that the charge here preferred (under section 2 of the Merchandise Marks Act, 1887) was a criminal charge, and that the general principle of law is ‘*Nemo reus est nisi mens sit rea*.’ There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exceptions. Apart from statute, exceptions have been engrafted upon the rule; for example, in the case of *R. v. Stephens* (s), the defendant was held liable on an indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by him but managed by his son, although it was proved that the men employed at the quarry had been by order prohibited from doing the acts complained of. No doubt in that case the fact that the proceedings were only in form criminal was adverted to by the Judge who decided it, but the fact remains that the defendant was criminally indicted” (t).

Upon the principles thus laid down there seems to be general judicial agreement, and the whole difficulty arises on their application to particular definitions of offences; *i.e.*, in deciding whether the statute prohibits absolutely the acts defined as constituting an offence, or whether the prohibition is to be read with the common law qualification. The application must in every case turn on the wording

(q) Cf. *Cundy v. Lecocq* (1884), 13 Q. B. D. 207, and p. 515, *post*.

(r) [1898] 2 Q. B. 306, 311, 312.

(s) (1866), L. R. 1 Q. B. 702.

(t) See also *Pearks, Gunston and Tee v. Ward*, [1902] 2 K. B. 1, 11, Channell, J. In such cases “the Legislature has thought it so important to prevent the particular act (Adulteration) from being committed that it absolutely forbids it to be done; and if it is done, the offender is liable to a penalty whether he had any *mens rea* or not.”

of the particular enactment, or, in case of ambiguity (u), upon the governing intention of the Act in which it is contained, or the set of Acts relating to the subject-matter. And decisions on particular statutes are consequently of value only when they are *in pari materia* with the enactment under discussion, or are drawn in the same terms as that under review. These rules apply equally to Orders in Council or other instruments issued under statutory authority which create offences. The modern tendency in statutes seems to be to decrease the importance of *mens rea* in crime. In recent times Goddard, J., has said (x): "With the complexity of modern legislation one knows that there are times when the Court is constrained to find that, by reason of the clear terms of an Act of Parliament, *mens rea* or the absence of *mens rea* becomes immaterial and that if a certain act is done, an offence is committed whether the person charged knew or did not know of the Act." More recently Lord Goddard, C.J., has expressed himself thus: "It is of the utmost importance for the liberty of the subject that a Court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind" (y). And again (z): "If a statute contains an absolute prohibition against the doing of some act, as a general rule *mens rea* is not a constituent of the offence, but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how is he to carry out the duty imposed?" Again the learned Chief Justice has said (a): "*Actus non facit reum nisi mens sit rea* is a cardinal doctrine of the criminal law. No doubt the Legislature can create offences which consist solely in doing an act whatever the intention or state of mind of the actor may be . . . of late years the Courts have been so accustomed to dealing with a host of offences created by regulations and orders independent of guilty intention, that it is desirable to emphasise that such cases should be regarded as exceptions to the rule that a person cannot be convicted of a crime unless it is shown not only that he has committed a forbidden act or default but also that a wrongful intention or blameworthy condition of mind can be imputed to him."

It will be found that by using the words "wilfully and maliciously," or by specifying some special intent as an element of particular crimes,

(u) See *Nicholls v. Hall* (1873), L. R. 8 C. P. 322, 326-7, Keating, J.

(x) *Evans v. Dell* (1937), 53 T. L. R. 310, 313.

(y) *Brend v. Wood* (1946), 62 T. L. R. 462, 463.

(z) *Harding v. Price*, [1948] 1 K. B. 695, 701 (failure to inform police of collision), following *Nicholls v. Hall* (1873), L. R. 8 C. P. 322, 326, Keating, J.

(a) *Younghusband v. Luftig*, [1949] 2 K. B. 354, 370.

knowledge is implicitly made part of the statutory definition of most modern definitions of crime; but there are some enactments of which this cannot be said (b).

"Although, *prima facie* and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong, or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or commerce, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence, and is a criminal matter . . . and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does so at his peril" (c). "*Mens rea* may be dispensed with," said Cockburn, C.J., in *R. v. Sleep* (d), "by statute, although the terms which should induce us to infer that it is dispensed with must be very strong." "There are enactments," said Brett, J., in *R. v. Prince* (e), "which by their form *seem* to constitute the prohibited acts into crimes and by virtue of which enactments the defendants charged with the committal of the prohibited acts may be convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are enactments with regard to trespass in pursuit of game, or of piracy of literary or dramatic works (f), or the statutes passed to protect the revenue." To these may be added enactments relating to the sale of intoxicating liquors (g), food (h), and drugs (i), fertilizers, and feeding stuffs (k), and to weights and measures (l). And the reason why it is not necessary to prove the existence of a *mens rea* in persons charged with committing offences against these enactments is because, as Brett, J., goes on to point out, they "do not constitute the prohibited acts into crimes or offences against the Crown but only prohibit them for the purpose of protecting the individual interest of individual persons or of the revenue" (m); and in a series of cases upon section 52

(b) *E.g.*, the Offences against the Person Act, 1861, ss. 55, 56; *R. v. Prince* (1875), L. R. 2 C. C. R. 154; and s. 4, but not ss. 5, 6, 7, of the Criminal Law Amendment Act, 1885.

(c) *R. v. Tolson* (1889), 23 Q. B. D. 168 at p. 173, Wills, J.

(d) (1861), L. & C. 44, 53.

(e) (1875), L. R. 2 C. C. R. 154, 163.

(f) See *Watkins v. Major* (1875), L. R. 10 C. P. 662.

(g) *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Emery v. Nolloth*, [1903] 2 K. B. 264.

(h) *Dyke v. Gower*, [1892] 1 Q. B. 220.

(i) Cf. *Fitzpatrick v. Kelly* (1873), L. R. 8 Q. B. 337.

(k) *Laird v. Dobell*, [1906] 1 K. B. 131; *Corten v. West Sussex County Council* (1903), 72 L. J. K. B. 514.

(l) Cf. *Great Western Ry. v. Bailie* (1864), 5 B. & S. 928.

(m) Cf. *Davies v. Harvey* (1874), L. R. 9 Q. B. 433; *Bond v. Evans* (1888), 21 Q. B. D. 249.

of the Malicious Damage Act, 1861, it has been held that an offence is committed against the section by doing damage wilfully, though the damage is not done maliciously nor with intent to injure the owner of the property (*n*). In deciding as to whether or not it is necessary to prove the existence of *mens rea*, the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed, must all be considered (*o*).

(b) *Knowledge or personal neglect must be proved.* Another important general rule with regard to the operation of penal statutes is that before a person can be convicted under a penal statute it is necessary to prove either (i) that he knew that he was doing the prohibited act, or that it happened either in consequence of his personal neglect or (ii) without his having any lawful excuse (*p*). If the accused was insane, under the present law he is found guilty but insane, and is not acquitted for insanity as he was under the common law (*q*). But with reference to neglect the law is unchanged. In *Nicholls v. Hall* (*r*), a person had been convicted under the Animals Order, 1871, made under the Contagious Diseases (Animals) Act, 1869 (*s*), for neglecting to give notice of the fact that he had in his possession a diseased animal; his defence was that he was not aware that the animal was diseased, and that, consequently, it was impossible for him to give notice of a fact of which he had no knowledge. On appeal, the conviction was quashed on the ground that this defence was a good one, and that "knowledge is an essential ingredient of the offence." For, as the Court said in *Emmerton v. Matthews* (*t*), "a salesman offering for sale a carcase with a defect of which he is not only ignorant, but has not any means of knowledge, is not liable to any penalty, and does not, as a matter of law, impliedly warrant that the carcase is fit for human food" (*u*).

On the other hand, in *Chajutin v. Whitehead* (*x*), a case of being in possession of an altered passport contrary to the Aliens Order, 1920, the Court held that the relevant article in the Order was imperative, that it was unnecessary to prove guilty knowledge of the alteration

(*n*) *Roper v. Knott*, [1898] 1 Q. B. 868; *Gardner v. Mansbridge* (1887), 19 Q. B. D. 217; *Horton v. Gwynne*, [1921] 2 K. B. 661.

(*o*) *Moussell Brothers, Ltd. v. L. N. W. Ry.*, [1917] 2 K. B. 836, at p. 845. Atkin, J. (Railway Clauses Act, 1845, s. 98, company held liable for default of their manager as statute was absolute and no *mens rea* was necessary).

(*p*) *Vide* 4 Bl. Comm. 21.

(*q*) See 46 & 47 Vict. c. 38; and Archb. Cr. Pl. (31st ed.), 193—4.

(*r*) (1873), L. R. 8 C. P. 322, 326, Keating, J.

(*s*) 32 & 33 Vict. c. 70, superseded by the Diseases of Animals Act, 1894.

(*t*) (1862), 7 H. & N. 586, 594.

(*u*) The sale was of a specific carcass which the buyer had previously inspected. There was therefore no implied warranty, such as there might have been if the meat had been sold by description. See Sale of Goods Act, 1893, s. 14; and *Bostock v. Nicholson*, [1904] 1 K. B. 725.

(*x*) [1938] 1 K. B. 506, 509. Cf. *Allard v. Selfridge & Co. Ltd.*, [1925] 1 K. B. 129, 137.

and the defendant was not entitled to acquittal by showing that he did not know and had no reason to suspect that the passport had been altered. Lord Hewart, C.J., said: "the case seems to me to fall within the large and comprehensive class of cases where if a person does an act which is prohibited by statute, that fact imputes to him a sufficient degree of *mens rea* to bring it about that the offence is proved."

(c) *Master may not be liable for negligence of servant.* In *Dickenson v. Fletcher* (y), an owner of a mine was indicted under the Mines Regulation Act, 1860, for not having the safety lamps used in the mine examined and securely locked by some duly authorised person. It was proved that the respondent had appointed a competent lamp-man, and that it was through his default that, on the occasion in question, the lamps had been given out unlocked. Upon these facts the magistrates had refused to convict, and, on appeal, their decision was confirmed, on the ground that a person cannot be made liable to a penalty if there has been no neglect or default on his part. But this rule is not absolute. Whether there must be proof express or implied of a *mens rea* in the accused person before he can be convicted of a criminal offence "depends on the terms of the statute or ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class or that the prescribed conditions have been fulfilled he will be adjudged guilty of the offence, although in fact he knew nothing of the prohibition" (z). In *Hobbs v. Mayor, etc., of Winchester* (a), the Court had to determine the true meaning and effect of sections 116 and 117 of the Public Health Act, 1875. The object of the sections is to prevent danger to the public health by the sale of articles unfit for human consumption. Cozens-Hardy, M.R., said: "That raises the question whether the offence under section 117 is complete by the mere fact of exposing for sale and selling meat unfit for human consumption or whether it is necessary to prove in addition that the butcher knew it was unfit. I say 'the butcher' because, with great respect to Mr. Avory, who has argued this case with his usual ability, I am unable to appreciate the force of his contention that the doctrine of *mens rea* can have any application at all unless the person charged has himself the guilty knowledge. In my opinion the offence was complete when the unsound meat was exposed for sale and sold, and I think it is not relevant for the butcher to say 'I did not know and my men did not know and neither I nor they

(y) (1873), L. R. 9 C. P. 1.

(z) *Bruhn v. R.*, [1909] A. C. 317, 323, Lord Atkinson. The appellant, the master of a German ship, had been convicted under the Straits Settlements Opium Ordinance (No. XX) of 1906 in respect of chandu on board the ship in excess of the amount allowed under the Ordinance, though the master was unaware of, and not privy to, the presence of the chandu. The Privy Council upheld the conviction.

(a) [1910] 2 K. B. 471, 478—480.

with such knowledge as we had having regard to our position in life could have ascertained that the meat was unsound, although experts have subsequently given evidence which has satisfied the arbitrator that such was the case.' I think we are not without very clear guidance on this point, although it may be that the exact point has never arisen for decision. Kennedy, L.J., has referred to the judgment of Stephen, J., in *Cundy v. Lecocq* (b), which seems to me to lay down the true principle which ought to be applied to cases of this kind. That was not a decision under this particular Act, but was a decision under the Licensing Act, 1872 (c). There a publican was charged with selling intoxicating liquor to a drunken person. He did not know, and his assistants did not know, that the man was drunk, but Stephen, J., says this: 'I am of opinion that this conviction should be affirmed. Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shown. I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bona fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed.' Then he goes on to say that he was led to that conclusion by the general scope of the Act and by the fact that some of the sections contained the word 'knowingly' which was absent from the section which he was there considering. That is a remark which applies with peculiar force to the Public Health Act, 1875, because in many sections to which our attention has been called that word 'knowingly' is to be found. But I prefer to go to the decisions upon these particular sections 116 and 117. The earliest in point of time is *Mallinson v. Carr* (d). It is true that the following passage is *dictum* only, but it is a *dictum* by a Judge of great eminence in this branch of the law. Stephen, J., after expressing the view that an offence was committed under the Act if a man had in his possession meat intended for human food and unfit for human food without any exposure for sale, says: 'It was argued that this construction would render liable to conviction persons who were ignorant of the fact that the meat found in their possession was unfit for human food, and it was said to be an unreasonable intention to impute to the Legislature. I do not think that is the proper way to

(b) (1884), 13 Q. B. D. 207, 209. Cf. *R. v. Bishop* (1880), 5 Q. B. D. 259.

(c) 35 & 36 Vict. c. 94, s. 13, repealed and re-enacted as s. 75 of the Licensing (Consolidation) Act, 1910.

(d) [1891] 1 Q. B. 48, 52; distinguished in *Wieland v. Butler Hogan* (1904), 73 L. J. K. B. 513, 515, where Lord Alverstone, C.J., explained *Mallinson v. Carr* (*supra*) "as where a person keeps meat he knows to be putrid, even though he may not have exposed it for sale, there is evidence on which he may be convicted."

interpret an Act of Parliament. The true rule is to take the words used in their ordinary and natural sense, and to construe them accordingly without reference to any supposed intention of the Legislature which cannot be gathered from the natural and ordinary meaning of the words. The short result is that a person in possession of meat intended for human food and unfit for human food is liable to conviction; and, for my own part, I think he is liable whether he knows or does not know, that the meat was unfit for human food.' The matter came shortly afterwards before the Court in *Blaker v. Tillstone* (e), which I agree is not directly in point, but there was a discussion on the Act by Lord Coleridge, C.J., in the course of which he says this: 'The object of the Act is that people shall not be exposed to the danger of eating and drinking poison; that anything which is likely to injure life shall not be sold. The question for us is whether the magistrate is bound to insist on direct proof of knowledge on the part of the seller of the bad condition of the stuff sold. Perhaps it might be an answer to this contention to say that the Act of Parliament would be nugatory if such proof were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold and that it was not his duty under the statute to make any inquiries on the point, with the obvious result that a man might in practice go on selling meat which was positively injurious without the possibility of getting a conviction against him.' "

Under the Sale of Food and Drugs Acts milk-sellers have been convicted for the acts of their servants without any evidence of personal knowledge or default (f). And convictions of employers for contravening the Licensing Acts (g), the Merchandise Marks Acts (h), the Weights and Measures Acts (i), and even Revenue Acts (k), have been supported in respect of the violation of the statutes by a servant, if the act done was within the scope of the servant's authority, and even if it was done in disobedience to express directions by the master (l).

Some modern Acts substitute presumption for evidence, and throw on the accused the burden of establishing his innocence as in *R. v. Kent Justices* (m), where an information was laid against a postmaster, who was also a baker, for using false scales contrary to the Weights and Measures Act, 1878. Section 59 of that Act created a

(e) [1894] 1 Q. B. 345, 347, *Firth v. McPhail*, [1905] 2 K. B. 300, *Horton v. Gwynne*, [1921] 2 K. B. 661, *Cotterill v. Penn*, [1936] 1 K. B. 53.

(f) *Dyke v. Gower*, [1892] 1 Q. B. 220; *Parker v. Alder*, [1899] 1 Q. B. 20, followed in *Andrews v. Luckin* (1917), 87 L. J. K. B. 507; 117 L. T. 726.

(g) *Brooks v. Mason*, [1902] 2 K. B. 743; *Cundy v. Lecocq*, *supra*, note (b).

(h) *Coppen v. Moore* (No. 2), [1898] 2 Q. B. 306.

(i) *Anglo-American Oil Co. v. Manning*, [1908] 1 K. B. 536, 541, *Channell, J.*, contrast *Roberts v. Woodward* (1890), 25 Q. B. D. 412.

(k) *Strutt v. Clift*, [1911] 1 K. B. 1 (keeping van without license).

(l) *Police Commissioner v. Cartman*, [1896] 1 Q. B. 655, where all the authorities are collected; *R. v. Duke of Leinster*, [1924] 1 K. B. 311; *Allen v. Whitehead*, [1930] 1 K. B. 211; contrast *Williamson v. Norris*, [1899] 1 Q. B. 7; p. 509 n. (o) *ante*.

(m) (1889), 24 Q. B. D. 181, 185.

presumption that any weights and measures found in the possession of a person who carries on a trade or on the premises of such, were in his possession for use in his trade until the contrary is proved. Matthew, J., said: "The provisions of the Act are highly penal. They substitute, as is the modern fashion, presumption for evidence." So in *Coppen v. Moore* (No. 2) (n), Lord Russell of Killowen, C.J., said: "In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts unless he was able to rebut the *prima facie* presumption of guilt by one or other of the methods pointed out in the Act" (n). But even under such Acts *bona fide* belief in facts which, if true, would make the act done no offence, excludes the presumption of guilt arising from proof that the act was done (o).

(d) *Bona fide claim of right ousts jurisdiction of inferior Court.* Another important rule with regard to the operation of penal statutes is that a *bona fide* claim of right ousts the jurisdiction of an inferior Court. In other words, the jurisdiction of justices is ousted where a defendant sets up a *bona fide* claim of right and has a fair and reasonable ground for the supposition of that right. This is not in reality a common law restriction so far as concerns justices of the peace, for "all summary jurisdiction is the creation of statute; and on the principle that title could not be intended to be decided by an inferior tribunal, there has arisen the well-established rule that every statute giving summary jurisdiction has the implied restriction as to title, and that the justices must hold their hands if a *bona fide* claim of right is set up" (p). "The rule of law," said Blackburn, J., in *R. v. Stimpson* (q), "is that the justices are not to convict where a real question is raised between the parties as to the right. As soon as that is done the jurisdiction which before existed ceases, and the question ought to be left to be decided by a higher tribunal." But the rule of law must not be read as absolute, for "it is perfectly competent to the Legislature to qualify the restriction within such limits as seem good to them," and the Courts must in each case adjudicate with reference to the law of the particular enactment giving or restricting the jurisdiction of the tribunal in question. "The Legislature, therefore, having expressly stated the limit (as to a *bona fide* claim of right) it is not for us to impose any other limit; the express restriction supersedes the implied restriction" (r). Thus, in some statutes, as the Highway Acts, the terms used show that the justices are not to hold their hands even if a claim of right is set up (s). In *Cornwell v.*

(n) [1898] 2 Q. B. 306, 313.

(o) *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Somerset v. Wade*, [1894] 1 Q. B. 574; *Bank of New South Wales v. Piper*, [1897] A. C. 383, 389.

(p) *White v. Feast* (1872), L. R. 7 Q. B. 353, 358, Blackburn, J.; *R. v. Clemens*, [1898] 1 Q. B. 556, C. C. R.; *Farey v. Welch*, [1929] 1 K. B. 388.

(q) (1863), 32 L. J. M. C. 208, 210.

(r) *White v. Feast* (1872), L. R. 7 Q. B. 353, 357, Cockburn, C.J., followed in *Brooks v. Hamlyn* (1899), 79 L. T. 734.

(s) *White v. Feast*, *supra* at p. 358, Blackburn, J.; and see *Leicester Urban Sanitary Authority v. Holland* (1887), 57 L. J. M. C. 75.

Sanders (t), Cockburn, C.J., pointed out "that the doctrine as to the jurisdiction of the justices being ousted by a claim of right applies only to a claim of right alleged by the defendant as a part of his case which he comes before the justices to set up. If he *bona fide* raises a question of title in himself, the justices have no longer any jurisdiction to go on with the hearing; but there must be some show of reason in the claim, and it is not sufficient unless he satisfy the justices that there is some reasonable ground for his assertion of title." A person, therefore, who makes a claim of right must be prepared to show that the right he claims is one which can exist in law (u), and, as Wightman, J., observed in the same case, if it appears that the title which he sets up in himself is "not such a title as is known to the law," the jurisdiction of the justices will not be ousted. In *Hudson v. M'Rae* (x), a man was convicted for "unlawfully and wilfully attempting to take fish" contrary to section 24 of the Larceny Act, 1861. It was proved that he claimed a right, as one of the public, to fish from a footpath where the public had fished for sixty years previously. The justices held that he had acted and made his claim under a *bona fide* but mistaken supposition that he had such a right, but that such a right could not be acquired in a non-navigable river. The conviction was upheld on appeal, on the ground that the right set up could not possibly exist in law, and that, consequently, the jurisdiction of the magistrates was not ousted. In *R. v. French* (y), on proceedings under the Offences against the Person Act, 1861, it was contended that the jurisdiction of the justices was ousted by the proviso in section 46 against the determination of assault cases "in which any question shall arise as to the title to any lands," etc., but this proviso was held not to apply to a case where two commoners quarrelled on the question whether one of them was using his common rights to excess.

Recovery of penalty.

2. *Who may sue for penalty.* In *Bradlaugh v. Clarke* (z), Lord Selborne said: "It was acknowledged as an incontestable proposition of law (a) 'that where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it.' Bramwell, L.J., referred to Comyns' Digest, Forfeiture, C., as correctly laying down that doctrine. If it were necessary, many other authorities to the same effect might be mentioned. It rests on a very plain and clear principle. No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty

(t) (1862), 32 L. J. M. C. 6, 9; *Birnie v. Marshall* (1876), 35 L. T. 373.

(u) See *Hargreaves v. Diddams* (1875), L. R. 10 Q. B. 582; *Pearce v. Scotcher* (1882), 9 Q. B. D. 162; *Simpson v. Wells* (1872), L. R. 7 Q. B. 214; *Brooks v. Hamlyn*, *supra*.

(x) (1864), 33 L. J. M. C. 65.

(y) [1902] 1 K. B. 637.

(z) (1883), 8 App. Cas. 354, 358.

(a) It would have been more accurate to say "established rule of construction."

of this nature unless it is expressly or by necessary implication given to him by statute. The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested *jure publico* in all penalties imposed by such statutes, and therefore may sue for them in due course of law where no provision is made to the contrary. The *onus* is upon a common informer to show that the statute has conferred upon him a right of action to recover the particular penalty which he claims" (aa).

Joint or several liability to penalty. "It has been decided," said the Judicial Committee in *Del Campo v. R.* (b), "that, where the offence is made a joint offence by statute, the parties concerned are liable to but one forfeiture"; but, if a statute imposes a penalty for an offence, and expressly states that "every person" concerned in committing the offence shall be liable to the penalty, the penalty may be recovered against each person concerned, although only one offence has been committed (c). But if the statute does not expressly state whether the penalty is a joint or several liability, the rule stated by Lord Mansfield in *R. v. Clark* (d), applies. He said: "Where the offence is in its nature single and cannot be severed, there the penalty shall be only single, because, though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where each person concerned may be separately guilty of it, there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime. For instance, the offence created by 1 & 2 Ph. & Mar. c. 12, is the impounding a distress in a wrong place. One, two, three, or four may impound it wrongfully; it is still but one act of impounding; it cannot be severed; it is but one offence, and therefore shall be satisfied by one forfeiture. So, under 6 Anne, c. 16 (e), killing a hare is but one offence in its nature, whether one or twenty kill it; it cannot be killed more than once. If partridges are netted by night, two, three or more may draw the net, but still it constitutes but one offence." But it was held in *R. v. Littlechild* (f) that the offence of "killing or taking any game . . . on a Sunday," in contravention of section 3 of the Game Act, 1831, is an offence which "it is perfectly clear that two or more persons may commit," and for which they may be "jointly charged" but "separately convicted." And it is important to come to a correct decision as to whether an offence is several or not, because, if an offence is several and a joint fine is imposed upon all the persons engaged in committing the offence, such a conviction would be bad and liable to be quashed. It was so held in *Morgan v. Brown* (g), for, as it is said in Hawkins

(aa) As to common informers see *ante*, p. 499, note (n).

(b) (1837), 2 Moore P. C. 15, 18.

(c) *R. v. Dean* (1843), 12 M. & W. 39.

(d) (1777), 2 Cowp. 610, 612.

(f) (1871), L. R. 6 Q. B. 293.

(e) 6 Anne, c. 14, Ruffhead.

(g) (1836), 4 A. & E. 515.

(P. C. bk. ii, c. 48, s. 18), "otherwise one who hath paid his proportionate part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another."

Cumulative penalties. A question sometimes arises whether the penalty imposed by a statute for doing some certain prohibited act is cumulative (*h*) or not, that is to say, whether, if the act is done by the same person more than once on the same day and at the same place, that person is liable to one penalty only or to a penalty for each time he does the act in question. The answer to this question depends upon the language employed by the Legislature (*i*), it being borne in mind, as was said by Bovill, C.J., in *Garrett v. Messenger* (*k*), that "if the Legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms" (*l*). It was enacted by 12 Geo. 2, c. 36, s. 1, that "it shall not be lawful to import into this kingdom for sale any book . . . and if any person shall sell any such book . . . such offender shall forfeit £5 and double the value of every book which he shall so sell," and in *Brooke v. Milliken* (*m*) it was held that a person who sold two such books to different persons on the same day was liable to a penalty for each act of sale. And in *Ex p. Beal* (*n*), it was held that, where a penalty of £10 was imposed by section 6 of the Copyright Act, 1862, "if any person . . . shall sell any repetition copy or imitation of any work of the copyright of which he is not at the time being the proprietor," a person who sold ten copies at one time of such a work had committed ten separate offences, and was liable to be punished for each separately (*o*). But if it is clear from the language used in the statute that, as Lord Mansfield said in *Crepps v. Durden* (*p*), "repeated offences are not the object which the Legislature had in view in making the statute, but singly to punish a man for exercising his ordinary trade and calling on a Sunday" the penalty will not be considered as cumulative. That case turned on section 1 of the Sunday Observance Act, 1677, which enacts that "no tradesman shall do or exercise any worldly labour upon the Lord's Day, and that every person shall for every such offence forfeit the sum of five shillings," and it was held that a person who sold small hot loaves four times on one Sunday had committed but one offence against the statute, and was liable to one penalty only. "On the construction of the Act of

(*h*) Penalties are also said to be cumulative when a person by the same act commits two distinct and substantive offences: *Saunders v. Baldy* (1865), 6 B. & S. 791.

(*i*) See *Llewellyn v. Vale of Glamorgan Ry.*, [1898] 1 Q. B. 473, 476.

(*k*) (1867), L. R. 2 C. P. 583, 585.

(*l*) See *Apothecaries' Co. v. Jones*, [1893] 1 Q. B. 89, and cases there cited.

(*m*) (1789), 3 T. R. 509.

(*n*) (1868), L. R. 3 Q. B. 387.

(*o*) As to mitigation of penalties, see *Hildesheimer v. W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552. (Court may give a lump sum as penalty for a number of the same offences.)

(*p*) (1777), 2 Cowp. 640, 647.

Parliament," said Lord Mansfield, "the offence is, exercising his ordinary trade upon the Lord's Day, and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or of a number of particular acts. There is no idea conveyed by the Act itself that, if a tailor sews on the Lord's Day, every stitch he takes is a separate offence, or if a shoemaker work for different customers at different times on the same Sunday that those are so many separate and distinct offences." This decision was followed in *Apothecaries' Co. v. Jones* (q), where a number of other cases were discussed, and it was held that only one penalty was incurred under section 20 of the Apothecaries Act, 1815, by an uncertificated person, who practised as an apothecary and attended three persons on the same day, as the statute was directed against an habitual or continuous course of conduct, not against an individual act.

Alternative penalties. Penalties are also said to be cumulative when the same act or omission constitutes an offence under two or more Acts or under an Act and at common law. But this use of the term is inaccurate, as such penalties are always alternative and not cumulative (r).

Corporations as affected by penal Acts.

3. Section 2 (2) of the Interpretation Act, 1889, provides that where under any Act (whether general, local and personal, or private, and whether passed before or after January 1, 1890) any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

The liabilities of corporations under penal statutes are thus stated by Bowen, L.J., in *R. v. Tyler and International Commercial Co.* (s): "I take it therefore to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law, punishable in the case of private persons by indictment, the offending corporation cannot escape from the consequences that would follow in the case of an individual by showing that they are a corporation. That seems to me to be good sense and good law."

By section 2 (1) of the Interpretation Act, 1889 (t): "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after January 1, 1890, the expression 'person' shall, unless the contrary intention appears, include a body corporate." The statutory rule is laid down in terms partly wider, partly narrower, than the judicial rule, which was enunciated without reference to the

(q) [1893] 1 Q. B. 89.

(r) *Vide ante*, p. 315; Interpretation Act, 1889, s. 33, *post*, App. B; *Sims v. Pay* (1888), 58 L. J. M. C. 39.

(s) [1891] 2 Q. B. 588, 594.

(t) Which repeals and re-enacts 7 & 8 Geo. 4, c. 28, s. 14.

statute. A contrary intention is held to appear in the case of offences which involve *mens rea* (of which a corporation is incapable) or the punishment for which is imprisonment (*u*). By the general principles of the law *mens rea* is an essential to a criminal offence. But as we have seen above, the Legislature may prohibit a thing absolutely in such a way that the mere doing of it, even though there is no *mens rea*, is an offence. A corporation can be guilty of an offence of this kind (*x*). But a corporation cannot be convicted of an offence for which the punishment is imprisonment or whipping, as those punishments are inapplicable to such a body (*y*).

Contracts as affected by penal Acts.

4. *Avoidance of a contract involving the doing of a penalised act.* A contract which involves in its fulfilment the doing of an act prohibited by statute is void (*z*); and, as a general rule, as Lord Hatherley said in *Re Cork and Youghal Railway* (*a*), "everything in respect to which a penalty is imposed by statute must be taken to be a thing forbidden." Consequently, if a contract involves in its performance the doing of anything rendered penal by statute, the contract will be void. This rule of law was enunciated by Lord Holt in *Bartlett v. Vinor* (*b*), as follows: "but if anything had appeared against law in the declaration or upon the pleadings, though it was not prohibited in the statute but only a penalty annexed, the agreement is void; for, though the difference in [*Jones v. Jones*] (1603) Hob. 189, stands, yet in every case where a penalty is annexed to the doing of an act, though it be not prohibited, yet if it appears upon the record to be the consideration, the agreement is void, for it will be ridiculous to give judgment that the plaintiff shall receive such a thing, the which if he takes, he shall be subject to the penalty of a statute; and therefore in every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, for it cannot be intended that a statute would inflict a penalty for a lawful act."

Even where no penalty is imposed, if an act or contract is declared illegal, the Court will not enforce any claim based thereon (*c*), unless the illegality is such as can be waived. Whether such waiver is allowable must depend on the terms and intent of the statute, *i.e.*, on whether

(*u*) *R. v. Cory Bros. & Co., Ltd.*, [1927] 1 K. B. 810, and cf. Criminal Justice Act, 1925, s. 33.

(*x*) See *Pearks, Gunston and Tee, Ltd. v. Ward*, [1902] 2 K. B. 1, a case under the Sale of Food and Drugs Act, 1875 (repealed and re-enacted by Food and Drugs (Adulteration) Act, 1928); and *Chuter v. Freeth Pocock, Ltd.*, [1911] 2 K. B. 832, giving a false warranty contrary to the Sale of Food and Drugs Act, 1899.

(*y*) *Hawke v. Hulron*, [1909] 2 K. B. 93.

(*z*) See p. 232, *ante*.

(*a*) (1869), L. R. 4 Ch. App. 748, 758.

(*b*) (1692), *Skinner* 322, 323.

(*c*) *Melliss v. Shirley Local Board* (1885), 16 Q. B. D. 446, 451, Lord Esher, M.R.; *Scott v. Brown, Doering & Co.*, [1892] 2 Q. B. 724; *Gedge v. Royal Exchange Assurance*, [1900] 2 Q. B. 214; *Re Mahmoud and Ispahani*, [1921] 2 K. B. 716, 728, 729; *Re National Benefit Assurance Co.*, [1931] 1 Ch. 46; cf. Chitty, Contracts (20th ed.). pp. 518, 519.

the enactment is intended to secure a public or a particular interest (*d*).

A contract may be void without being illegal, when the making of the contract is forbidden, but the sole penalty for disobedience to the prohibition is that the contract cannot be enforced. This is the case with betting contracts within the Gaming Acts, 1845 and 1892 (*e*).

Contract not avoided where penalty merely imposed for revenue purposes. But the general rule, as enunciated by Lord Holt above, is subject to an important exception, arising from the fact that penalties are imposed by statute for two distinct purposes—(1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. The question, therefore, will always arise with regard to these cases, “whether,” as Parke, B., said in *Taylor v. Crowland Gas Co.* (*f*), “looking at the statute (44 Geo. 3, c. 98, s. 14), the object of the Legislature in imposing the penalty was to prohibit the particular act or whether it was for a different purpose. . . . Now, looking at the statute I am of opinion that the object of the Legislature was . . . to protect the public against the mistakes of inexperienced persons in matters of this kind (unqualified persons acting as conveyancers) and with that view, the Legislature has prohibited these acts being done except by a particular class of persons. The object of the Legislature could not have been merely to secure to the revenue the duty on certificates because it is only certain persons who can by law obtain such certificates.” The learned Judge thus distinguished *Smith v. Mawhood* (p. 524). In *Brown v. Duncan* (*g*), the plaintiffs were distillers, and one of them had rendered himself liable to a penalty under 4 Geo. 4, c. 94, s. 131 (*h*), for carrying on a retail business in spirits at the same time; it was contended, therefore, that as a penal statute had been contravened by one of them, the plaintiffs could not recover the price of spirits sold by them. “But we think,” said Lord Tenterden, “that the plaintiffs are entitled to recover; there has been no fraud on their parts, although they have not complied with the regulations which it has been thought wise to adopt in order to secure (as far as may be) the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. . . . Here the clauses of the Act (4 Geo. 4, c. 94, ss. 132, 133), had not for their object to protect the public, but the revenue only.” And in *Wetherall v. Jones* (*i*), where the plaintiff, who was a dealer in spirits, had rendered himself liable to a penalty for non-compliance with an excise regulation under 6 Geo. 4, c. 80, s. 115 (*h*), as to the form of the permit to be sent out along with any spirits sold by him, it was held that this

(*d*) See pp. 235, 250, *ante*.

(*e*) As to the nature of such contracts, see *Powell v. Kempton Park Racecourse Co.*, [1899] A. C. 143; *Moulis v. Owen*, [1907] 1 K. B. 747; *Saxby v. Fulton*, [1909] 2 K. B. 208; and Chitty, Contracts (20th ed.), pp. 1077–1085.

(*f*) (1854), 10 Ex. 293, 296, 297.

(*g*) (1829), 10 B. & C. 93, 99.

(*h*) Repealed and superseded by the Spirits Act, 1880.

(*i*) (1832), 3 B. & Ad. 221, 225, 226, Lord Tenterden, C.J.

irregularity as to the permit, "though a violation of law by him, did not deprive him of the right of suing upon a contract in itself perfectly legal." "Where," said the Court, "the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." Sections 25, 26 of the Excise Licences Act, 1825, imposed penalties on any person who sold tobacco without taking out the licence required for that purpose; but it was held in *Smith v. Mawhood* (k) that this Act did not avoid a contract for the sale of tobacco made by a person who had omitted to fulfil the requirements of the Act, because the penalties were imposed merely for the benefit of the revenue. "I think," said Parke, B., "that the object of the Legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the statute, but if such was the object, they certainly could not recover, although the prohibition was merely for the purpose of revenue." And in considering the effect of a statutory prohibition on a contract, it is always necessary to decide whether the penalty imposed for breach of the statute is meant as a compensation to the person aggrieved or as a penal sanction. In the former case, the statute in effect permits the contract on payment of the penalty, *i.e.*, it only makes it expensive; in the other, it forbids it *in toto* (l).

Avoidance of act prohibited although penalty not enforceable. If it is clear that if a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty imposed is not enforceable. Thus, in the *Sussex Peerage Claim* (m), the question was whether the marriage of the Duke of Sussex was rendered void by the Royal Marriages Act, 1772. That Act, by section 3, imposes the penalties of *præmunire* upon any person who solemnises or assists at the celebration of any marriage in contravention of its provisions. The marriage of the Duke of Sussex was celebrated without the royal consent required by the Act, but as it took place in Rome, and as there is no provision in section 3 for the trial of the offender where the offence was committed out of England, it was argued that the necessary inference was that the statute itself did not extend to prohibit a marriage out of England. This argument, however, did not prevail. "We think," said the Judges in delivering their opinion, "that the inference that the statute is itself defective in not making provision for the trial of British subjects when they violate the statute out of the realm is the more just and reasonable inference; not that we should refuse, on that account, to give the plain words of the statute their necessary force, and hold the enactment itself to be substantially useless and inoperative."

(k) (1845), 14 M. & W. 453, 463; approved in *Mellis v. Shirley L. B.* (1885), 16 Q. B. D. 446, 452.

(l) See *Musgrove v. Chung Teeong Toy*, [1891] A. C. 272.

(m) (1844), 11 Cl. & F. 85, 148, *per Tindal, C.J.*; 6 St. Tr. (N.S.) 79. Cf. p. 413, *ante*.

PART IV

LOCAL, PERSONAL AND PRIVATE ACTS

CHAPTER I

NATURE AND CONSTRUCTION OF PRIVATE ACTS

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Nature of private Acts.

1. *Parliamentary meaning.* Private Acts have been dealt with historically by Mr. Clifford in his excellent work on the History of Private Bill Legislation, and from the point of view of parliamentary practice by Sir Erskine May (*a*), and by the Standing Orders of both Houses, and in the reports of decisions by the Court of Referees on Private Bills. But these authorities are not to any extent concerned with the interpretation of a private Act, when obtained, which belongs to the Courts of law.

Parliament now understands by private Bills all those projects of laws which affect the interests of particular localities, persons or corporations, and are not of a public general character (*b*). Every Bill for the particular interest or benefit of any person or corporation, whether it is brought in upon petition or motion, or report from a committee, or brought from the Lords, is a private Bill within the meaning of the table of fees established by the Standing Orders of the House of Commons (*c*).

Distinction between public and private Acts.

2. Sir Erskine May points out (*d*) the difficulty which is found in distinguishing between public and private Bills in Parliament, and that

(*a*) Parliamentary Practice (15th ed.), pp. 833 ff; and see Ilbert, *Legislative Methods and Forms*.

(*b*) 1 Cliff., p. 267. See also Ilbert, 28, 33, 48—50; Sedgwick, pp. 24—27; and pp. 35, 53—55 *ante*. Such bills are usually introduced by petition.

(*c*) Standing Orders of House of Commons (published 1948), pp. 85 *et seq.*

(*d*) May (15th ed.), p. 837.

many Acts included in the public general statutes are, if public (e), not general, being confined to particular local areas.

(i) *By origin.* Private Acts appear to have originated in the orders made by Parliament upon the petitions of individuals for the redress of private grievances for which there was no remedy at common law, which were in the nature of orders issued by the High Court of Parliament. As the limits of judicature and legislation became defined, the petitioners applied more distinctly for legislative remedies (f).

"From the reign of Henry IV, the petitions addressed to Parliament prayed more distinctly for peculiar powers besides the general law of the land and for the special benefit of the petitioners. Whenever these were granted, the orders of Parliament, in whatever form they may have been expressed, were in the nature of private Acts, and after the mode of legislating by Bill and statute had grown up in the reign of Henry VI, these special enactments were embodied in the form of distinct statutes" (g).

But it is not until 1539 (31 Henry VIII) that the distinction between public Acts and private Acts is for the first time specifically stated on the enrolment in Chancery (h).

(ii) *By Parliamentary procedure.* The functions of Parliament in passing private Bills have always retained the mixed judicial and legislative character of ancient times, and, with certain exceptions, all Bills which are defined as private by the Standing Orders of either House, are still required to be brought in by petition (i). "In passing private Bills, Parliament still exercises its legislative functions, but its proceedings partake also of a judicial character. The persons whose private interests are to be promoted appear as suitors for the Bill, while those who apprehend injury are admitted as adverse parties in the suit. Many of the formalities of a Court of justice are maintained . . . and the solicitation of a Bill in Parliament has been regarded by Courts of equity so completely in the same light as an ordinary suit, that the promoters may be restrained by injunction from proceeding with a Bill the object of which was to set aside a covenant" (k). It was said in *Ex p. Hartridge and Allender* (l) that although the Court of Chancery "has a power to act *in personam*, and, if a proper case should be proved, to restrain any person from making an improper application to Parliament" for a private Act, still "it is difficult to conceive or define what are the cases in which it would be proper for the Court to exercise that power," and there is no record of any case in which this alleged power has been exercised.

(e) *Ibid.* pp. 851, 986-987.

(f) *Ibid.* p. 811, 1 Cliff. 270; Ilbert, p. 28.

(g) *Ibid.* p. 834.

(h) 1 Stat. Realm, Intro. p. xxxiii; see also a learned note to *R. v. Milton* (1843), 1 C. & K. 59, note (b); Cruise's Digest, vol. v, p. 1, tit. Private Act; and Comyns, Dig. tit. Parliament, R. 7.

(i) The present classification is given in detail in Standing Orders of House of Commons (published 1948).

(k) May (15th ed.), p. 835.

(l) (1870), L. R. 5 Ch. App. 671, 679, Selwyn, L.J.

(iii) *By method of proof and construction.* Coke appears to draw the following distinctions between public or general, and particular or private statutes (*m*):—

- (1) Their several degrees of notoriety:—"The Judges may and ought to take notice of public Acts without pleading, but private Acts must be pleaded."
- (2) The mode of trial:—"The existence of a public Act must be tried by the Judges, who are to inform themselves in the best manner they can. But a private Act may be put in issue, and shall be tried by the record" (*n*).
- (3) A private Act will not bind strangers though it is without a saving of their rights (*o*).

A public Act never required any proof (*p*), and where it is necessary to refer to one, a copy is not given in evidence, but is merely referred to to refresh the memory, and the person citing it cannot be required to put in a King's printer's copy (*q*). But it used to be held necessary to prove all private Acts, on the ground that though every man is bound to take notice of all Acts which concern the kingdom at large, he is not presumed to be cognisant of those which merely concern the private rights of another. "Originally," as Lord Lyndhurst said in *Woodward v. Cotton* (*r*), "private Acts were required to be proved by a copy examined with the Parliament Roll." They may also be proved by means of a transcript or of an exemplification under the Great Seal (*s*). The old modes of proof are still necessary, if it is required to prove a private Act which has not been printed by the King's printer (*t*). By section 3 of the Evidence Act, 1845, "all copies of private and local and personal Acts, if purporting to be printed by the printers to either House of Parliament, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed" (*u*).

For purposes of judicial notice all Acts passed after 1850 are deemed public Acts unless the contrary is declared therein (*x*). But as to

(*m*) 1 Inst. 98a. He does not use the terms "public" and "private," but "general" and "particular": *Holland's Case* (1597), 4 Co. Rep. 75 a, 76 a.

(*n*) See p. 46, *ante*.

(*o*) 1 Co. Litt. (edit. Thomas), p. 25, note (16). See p. 546, *post*.

(*p*) See p. 33, *ante*.

(*q*) *Forman v. Dawes* (1841), Car. & M. 127.

(*r*) (1834), 1 C. M. & R. 44, 48.

(*s*) See p. 36, *ante*.

(*t*) In *Doe d. Bacon v. Brydges* (1843), 6 M. & G. 282, the action was based on a Disgavelling Act alleged to have been passed in 2 & 3 Edw. 6, but not entered on the Parliament Roll. It therefore became necessary (1) to prove that such an Act was actually passed and (2) to give secondary evidence of its contents. For the first purpose a calendar was put in purporting to be made in 1640, containing sixty titles of statutes of 2 & 3 Edw. 6, of which No. 40 purported to be an Act for disgavelling lands in Kent. For the second purpose there was tendered as evidence a special verdict found on 13 & 14 Car. 2, referring to the alleged Act, and a copy of an Act purporting to be the Act in question found among the muniments of title of a Kentish landowner. The Court rejected the special verdict as inadmissible, and, ordering a new trial, did not pass judgment on the other points.

(*u*) See p. 35, *ante*; and see *Greswolde v. Kemp* (1842), Car. & M. 635.

(*x*) Interpretation Act, 1889, s. 9, *post*, Appendix B.

prior Acts the question may still arise whether they are public or private, and further questions arise as to the effect of the Interpretation Act, 1889, on the pleading and construction of private Acts.

(iv) *Grounds of distinction between public and private Acts.* Blackstone (y) defines private or special Acts "to be rather exceptions than rules, being those which only operate upon particular persons and private concerns, such as the Romans entitled *senatus decreta*, in contradistinction to *senatus consulta*, which regarded the whole community." This definition, so far as it relates to Acts prior to 1851, seems to be generally borne out by the decisions of the Judges. But it has some curious results (z). Thus, doubts existed till 1778 (a) whether the Toleration Act was a public or a private Act. In *Dawson v. Paver* (b), Wigram, V.-C., said, as to the distinction between a public and a private Act: "And whether an Act is public or private does not depend upon any technical construction (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case." In *Jones v. Axen* (c), it was held that 22 & 23 Chas. 2, c. 20 (an Act for the relief of insolvent debtors), was a public Act, for the following reasons: "Because (1) all the people of England may be concerned as creditors to these insolvents; (2) it is an Act of charity, and therefore ought to have a more candid interpretation; (3) it is an Act too long and difficult to be pleaded at large, so that it would put these poor people to a greater expense than they could bear to plead it specially" (d). In *Ingram v. Foot* (e), an Act of pardon was held not to be a general Act. In *Kirk v. Nowell* (f), Buller, J., said: "Though it be true that Acts of Parliament relating to trade in general are public Acts, yet a statute which relates only to a certain trade is a private one." If a private Act is referred to or in any way recognised by a subsequent public Act, the private Act must afterwards be regarded as a public Act (g). An Act has been held to be public if the Sovereign or the Prince of Wales is specially named in it. Thus, in *R. v. Buggs* (h), it was held that 2 & 3 Ph. & Mar. c. 11, which inflicted a penalty upon all persons, not being cloth-workers, who used the trade of dyers or weavers, was a public Act, as the forfeiture was to the King.

(y) 1 Comm. 85. See also Stephen's Comment. (20th ed.), p. 274, 396, 397 and Bacon's Abr. tit. Statutes [F].

(z) "It seems not a little extraordinary that a statute [23 Hen. 6, c. 9] which concerns the administration of the public justice of the whole kingdom should ever have been construed to be a private statute": 2 Williams' Saunders (edit. 1871). p. 454.

(a) 19 Geo. 3, c. 44, s. 4.

(b) (1847), 5 Hare 415, 434.

(c) (1696), 1 Ld. Raym. 119, 120.

(d) Cf. *Brett v. Beales* (1829). M. & M. 416, 421, p. 530, *post*.

(e) (1701), 1 Ld. Raym. 708.

(f) (1786), 1 T. R. 118, 125.

(g) *Saxby v. Kirkus* (1753), Buller, N. P. 224; *Samuel v. Evans* (1789), 2 T. R. 573.

(h) (1694), Skinner 429.

and so the King was concerned (i). Similarly, in *Morris v. Hunt* (k), it was objected that 53 Geo. 3, c. 152 (an Act to amend the law respecting the expenses of the hustings and poll-clerks so far as regarded the City of Westminster) was a private Act, but Abbott, C.J., said: "It relates to a branch of the Legislature of the kingdom, and that is sufficient to give it the character and operation of a public Act. . . . It has been held (l) that an Act relating to the Prince of Wales' rights in the Duchy of Cornwall is a public Act, by reason of the rank and importance of the personage to whom it relates. By parity of reasoning, the Act in question, from its nature, is a public Act." Acts of a local nature have been held to be public Acts on account of the publicity of the subject-matter treated of by them: e.g., the Act of Bedford Levels (m), and also the Act for rebuilding Tiverton (n). And in *Riddle v. White* (o), an Inclosure Act was held to be public because by it "the Legislature bind the land and change its nature, and thereby the rights of many persons who could not be parties are bound with it."

The insertion in a private Act of a section requiring it to be judicially noticed does not necessarily make it a public general Act. In *Hesse v. Stevenson* (p), a bankrupt under the provisions of a special Act declared to be a public Act, had assigned a patent which he had obtained before his bankruptcy. The Court held that the patent had, prior to the Act, vested in his assignees, and that the Act did not enlarge his title or that of his assignees or enable him to make a better title than he possessed before the Act. Lord Alvanley said: "But though the Act be public, it is of a private nature. The only object of the proviso for making it a public Act is that it may be judicially taken notice of instead of being specially pleaded, and to save the expense of proving an attested copy. But it never has been held that an Act of a private nature derives any additional weight or authority from such a proviso: it only affects Koops [the bankrupt] and those claiming under him, and authorises him to do certain acts which by the letters patent he could not have done. . . . It is not, then, possible to consider this Act as giving any title to Koops which he had not at the time when it was passed. Such has been the construction which has always been put upon Acts of Parliament of this nature." The same view was expressed by Lord Tenterden in *Brett v. Beales* (q), after consulting the Court of King's Bench; and by Lord Abinger in *Ballard v. Way* (r); and was adopted in Ireland by Brady, C., in *Att.-Gen. v. Ball* (s), and *Att.-Gen. v. Marrett* (t).

(i) *Willion v. Berkley* (Lord) (1562), Plowd. 223, 231; see *Barrington's Case* (1611), 8 Co. Rep. 136 b, 138 a; *Att.-Gen. v. Ball* (1846), 10 Ir. Eq. Rep. 161.

(k) (1819), 1 Chitt. (K. B.) 453, 456.

(l) 8 Co. Rep. 28 b.

(m) Buller: *Nisi Prius* 225; *Dupays v. Shepherd* (1698), 12 Mod. 216; Gilbert on Evidence 13; Pothier (edit. Evans), ii, 152.

(n) Buller's *Nisi Prius* 225.

(o) (1793), 1 Anstr. 281, 293.

(p) (1803), 3 B. & P. 565, 578.

(q) (1829), 1 M. & M. 416, 425.

(r) (1836), 1 M. & W. 520, 529.

(s) (1846), 10 Ir. Eq. Rep. 146.

(t) (1846), 10 Ir. Eq. Rep. 167.

In *Ballard v. Way* (u) it was proposed to put in evidence the Borough Market Act in an action with respect to premises named in the schedule to the Act, on the ground that the purchaser of the premises had notice of the provisions of the Act. Lord Abinger said: "I consider that these Acts do not affect all mankind with the knowledge of what is contained in them."

In *Brett v. Beales* (x) it was contended that 52 Geo. 3, c. cxli, must be proved by an examined copy of the Act from the Parliament Roll, and could not be proved by a King's printer's copy (although by section 166 it is called a public Act) and that it could not be put in evidence to prove the existence of the tolls to which it referred. Lord Tenterden held that the words making the Act public only applied to the forms of pleading (and authentication), and did not vary the general nature and operation of the Act; and secondly, that the power to levy tolls did not make the Act public, as it extended only to persons using the navigation. The latter reasoning applies to all railway Acts.

But all these decisions are before Lord Brougham's Act, 1850 (y); and in *Aiton v. Stephen* (z), Lord Cairns described a local Act (8 & 9 Vict. c. xxv) as "an Act which in the first instance assumed the shape of a private Bill, but which must be judicially noticed as a public Act, and must have all the operation of a public Act." This *dictum*, so far as it goes, is against the decisions already quoted, so far as they turn on the question of the public having notice of the provisions of such Acts, but it deals only with the publicity and not with the generality of the Act under discussion. *

Public, local and personal Acts.

3. Some Acts which go through Parliament as private Bills are when passed called "public, local, and personal," or merely "local and personal." This designation was first applied in 1797, when the House of Lords resolved that the King's printer should class the public general statutes and the special, local, and private in separate volumes; and on May 8, 1801, a resolution was passed by the House of Commons, and agreed to by the House of Lords, that the general statutes and the "public, local, and personal" in each session should be classed in separate volumes (a). The term "local and personal Act" was first used by the Legislature in Sir Frederick Pollock's Act, 1842 (b), by which certain special provisions were made with regard to Acts of this kind. The Act, 32 Geo. 3, c. 74, to maintain and improve Ramsgate Harbour was held to be of a local and personal nature within the Act of 26 Vict. c. 97. Coleridge, J., said: "The 55 Geo. 3 (another Ramsgate Harbour Act) was passed after the resolution (of

(u) *Supra*.

(x) *Supra*.

(y) 13 & 14 Vict. c. 21, s. 7.

(z) (1876), 1 App. Cas. 456, 457. Cf. *Chilton v. London Corporation* (1878), 7 Ch. D. 735, 740, Jessel, M.R.

(a) See *Richards v. Easto* (1846), 15 M. & W. 244, 251, Parke, B. and *infra*.

(b) 5 & 6 Vict. c. 97.

1801) had come into operation and it is printed among the local and personal Acts declared public, that is to say, among those which are local and personal but which contain a clause enacting that they are to be deemed and taken as public, by virtue of which clause the Judges are bound to take notice of them without their being specially pleaded. As the 5 & 6 Vict. c. 97 (limitation under local Acts) distinguishes between statutes *commonly called* public, local and personal or local and personal and those which are *not* of a local and personal nature and it is to be determined by the Court and not by the jury when any particular statute is commonly so called (which in itself would seem to be a mere matter of fact) there seems to be no better ground on which this is to be decided than a reference to the statute book itself: if we find it so printed under the directions of the Legislature, we have the best grounds for saying that it is commonly so called: and this appears to be more proper with references to the 5 & 6 Vict. c. 97, s. 5, which as to this fact is clearly framed with reference to the resolution and to the revision of statutes in the statute book thereby introduced" (c).

But it appears that no definite rule can be laid down as to whether an Act is to be considered "local and personal" or not, for it does not necessarily follow that because an Act is not printed among the local and personal Acts it will be held not to be of a local and personal nature. "Whether an Act is printed in one part of the statute-book or another depends," said Pollock, C.B., in *Richards v. Easto* (d), "upon whether certain fees have been paid upon it or not" (e). Thus, in *Cock v. Gent* (f), the Court held that 47 Geo. 3, c. xxxv (which empowered certain commissioners to adjudicate on demands not exceeding a certain amount made by any persons against defendants resident within certain limits, but which had a clause making it a public Act) "exactly met the description of a local and personal Act." In *Barnet v. Cox* (g), the Court held that the Metropolitan Police Acts are not of a local and personal nature, because of "the public importance of the rights that they maintain, and the generality of their application to all the Queen's subjects within the Metropolitan Police District." But this case must be read subject to the observations of Bowen, L.J., in *R. v. London County Council* (h). "That decision did not find favour with the Court of Exchequer in the case of *Moore v. Shepherd* (i), and was discussed in the Exchequer Chamber in *Shepherd v. Sharp* (k). In the latter case it is pointed out that if the Metropolitan Police Acts and Acts of that class are not local and

(c) *Shepherd v. Sharp* (1856), 1 H. & N. 115, 123; 25 L. J. Ex. 255.

(d) (1846), 15 M. & W. 244, 248.

(e) Since 1868 public Acts of a local character have been printed with the local Acts. But in the Parliament Roll the Acts are numbered consecutively without regard to whether they are general, local, personal, or private. See p. 54 *ante*.

(f) (1843), 12 M. & W. 234.

(g) (1846), 9 Q. B. 617, 623.

(h) [1893] 2 Q. B. 454, 464 (power of L. C. C. to amend local or personal Act).

(i) (1854), 24 L. J. Ex. 28.

(k) (1856), 1 H. & N. 115.

personal, it is because they affect the administration of law and justice, and therefore they are not local, because, although the place where justice is administered may be localised, the administration of justice touches the whole community, and they are not personal, because although the administration of justice may be concerned with the individual, yet really it affects the whole of the Queen's subjects. All Acts which deal with the administration of justice differ *in toto* from the class of local and personal Acts. They are not limited in the true sense either as regards place or persons."

Act may be partly public and partly private.

4. In *Richards v. Easto* (1), it was held that an Act may be in part public and in part private. And this principle was recognised in several early cases. Thus, in *Ingram v. Foot* (m), Holt, C.J., said: "Whereas it is urged that this Act concerns the King's revenues, therefore it is general law; the difference *per luy* is, when an Act concerns the King's revenues for the King's advantage, it is general, *secus* where it concerns it in order to a diminution thereof to the advantage of particular persons. And an Act of Parliament may be general in part and particular in other part." Again, in an *Anonymous Case* (n), Holt, C.J., said: "An Act of Parliament concerning the revenue of the King is a public law, but it may be private in respect to some clauses in it relating to a private person." The doctrine laid down in these three cases and in *Shepherd v. Sharp* (o) was adopted by the Court of Appeal in *R. v. London County Council* (p). In *Ex p. Gorely* (q), it was held that section 83 of 14 Geo. 3, c. 78 (r), whereby an insurance company if they suspect fraud can compel the insurance money to be laid out on rebuilding, applied generally to the whole of England, although the remainder of the Act was limited in its operation to the metropolitan district. "When we approach the 83rd section," said Lord Westbury, "we find that the enactment therein contained is heralded by a particular preamble of its own, which preamble recites a general and universal evil as being the occasion of its passing. I think, therefore, the just conclusion is that this enactment is intended to be general—is intended to meet a general and not a local evil." The decision in this case has been said to be of small authority since the doubts cast upon it by Lord Watson in *Westminster Fire Office v. Glasgow Provident Society* (s), but in that case Lords Selborne and Watson thought that section 83 did not extend to Scotland. The question was whether the section 83 applied as between mortgagor and

(1) (1846), 15 M. & W. 244.

(m) (1701), 12 Mod. 611, 613.

(n) (1698), 12 Mod. 249.

(o) *Supra*.

(p) [1893] 2 Q. B. 454.

(q) (1864), 34 L. J. Bank. 1, 4.

(r) Section 86 of the Act provides that no action shall lie against a person in whose house fire accidentally begins; see *Musgrove v. Pandelis*, [1919] 2 K. B. 43.

(s) (1888), 13 App. Cas. 699, 714, 716.

mortgagee. Lord Selborne was doubtful. Lord Watson merely said that he thought *Ex p. Gorely* "might require to be carefully considered." However, *Ex p. Gorely* was followed, notwithstanding these doubts, by Parker, J. (afterwards Lord Parker of Waddington) in *Sinnott v. Bowden* in 1912 (r). The construction of Lord Westbury has received some Parliamentary support from the fact that the sections in question were excepted from the general repeal of 14 Geo. 3, c. 78, by the Metropolitan Building Acts (u).

Construction of private Acts.

5. "It may be stated generally," said Lord Halsbury, in *Herron v. Rathmines and Rathgar Improvement Commissioners* (x), "that Parliament, in passing a private Act, looks to the public advantage and security, and looks to the interference with private rights. Where a work of any kind has to be constructed, Parliament has made an elaborate set of provisions, intended to secure to the public the advantages which the promoters propose as the reason for legislation and as the consideration for the rights of the persons affected, or sought to be affected, by the intended legislation. In dealing with the latter class of questions it has been said that the particular provisions may rather be regarded as words of contract to which the Legislature has given its sanction than as the words of the Legislature itself."

Stricter construction of private Act than of public Act. In *Altrincham Union Assessment Committee v. Cheshire Lines Committee* (y), Lord Esher said: "In the case of a private Act which is obtained by persons for their own benefit you construe more strictly provisions which they allege to be for their benefit, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But when the construction is perfectly clear there is no difference between the modes of construing a public Act and a private Act, the only difference [which at any time exists being] as to the strictness of the construction to be given to it when there is any doubt as to the meaning." In *Harper v. Hedges* (z), Scrutton, L.J., speaking of the construction of private Acts as contracts said: "So far as persons not concerned in the Act are concerned, the Act is read strictly against the promoters; so far as the promoters themselves are concerned it is read as a contract between them and is to be construed accordingly." In cases where the Act, though in form local or personal, is obtained for a public purpose and not for profit this rule has little weight (a).

(r) [1912] 2 Ch. 414.

(u) *E.g.*, 7 & 8 Vict. c. 84, Sched. A. By the Short Titles Act, 1896, the unrepealed sections of this Act were given the short title of the Fire Prevention (Metropolis) Act, 1774, which ignores the decision in *Ex p. Gorely*, *ubi supra*, as to the application of section 83.

(x) [1892] A. C. 498, 501.

(y) (1885), 15 Q. B. D. 597, 603.

(z) (1923), 93 L. J. K. B. 116, 117.

(a) *Stewart v. Thames Conservancy*, [1908] 1 K. B. 893.

Acts for the purpose of assurance construed as conveyances. "Private Acts," says Blackstone (b), "have been often resorted to as a mode of assurance where, by the ingenuity of some and the blunders of other practitioners, an estate is so grievously entangled by a multitude of resulting trusts, springing uses, executory devises, and the like artificial contrivances—a confusion unknown to the simple conveyances of the common law—that it is out of the power of either the courts of law or equity to relieve the owner. . . . A law thus made, though it binds all parties to the Bill, is yet looked upon rather as a private conveyance than as the solemn Act of the Legislature." In this opinion he is supported by Lord Hardwicke in *Hornby v. Houlditch* (c). Such private Acts are not, therefore, to be construed in precisely the same way as public Acts, but rather like a conveyance or a contract, "according," as Lord Kenyon said in *Townley v. Gibson* (d), "to the intention of the parties." Therefore, in order to construe it, "we may," as Lord Wensleydale said in *Rowbotham v. Wilson* (e), "look at the surrounding circumstances at the date of it," just as though it were an agreement. So, if a private Act contains a proviso which, taken literally, is unreasonable, "words not inconsistent with the words used [in the proviso] may be interpolated to give it a reasonable construction." So Channell, B., in *Makin v. Watkinson* (f), with regard to the construction of a covenant said: "And looking at it in this way (on general principles) *Vyse v. Wakefield* (g), is to some extent an authority, for it warrants the proposition that where a covenant would according to the letter be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men and intended what was reasonable." Brett, J., in *London and South Western Ry. v. Flower* (h), thought "this doctrine of *Makin v. Watkinson* is as applicable to the construction of a [private] Act of Parliament as to that of an ordinary contract."

In accordance with this rule of construction, an agreement entered into by the promoters of a private Bill will not be upset by the private Act when it comes into force, although the Act may contain some stipulation which is at variance with the agreement. Thus, in *Savin v. Hoylake Ry.* (i), it appeared that the plaintiff had agreed with the promoters of a railway Bill to bear the costs of obtaining it, but the Bill when passed was found to contain the usual clauses directing the railway company to pay the costs of obtaining the Bill:

(b) 2 Comm. 344. He is speaking of Estate Acts.

(c) (1737), cited 1 T. R. 96, 93. Cf. *Lucy v. Levington* (1671), 1 Ventr. 175.

(d) (1789), 2 T. R. 701, 705.

(e) (1860), 8 H. L. C. 348, 363.

(f) (1870), L. R. 6 Ex. 25, 27.

(g) (1840), 6 M. & W. 442.

(h) (1875), 1 C. P. D. 77, 85.

(i) (1865), L. R. 1 Ex. 9, 11; cf. *G. W. Ry. v. Waterford & Limerick Ry.* (1881). 17 Ch. D. 493, at p. 504, James, L.J.

consequently, the plaintiff argued that the Act upset the previous agreement. But the Court held otherwise. "A private Act of Parliament," said Pollock, C.B., "is in the nature of an agreement between the parties; why, then, may not an agreement be made in derogation of that private Act, provided the agreement be not inconsistent with the public interest or morality?" (k).

Presumption against interference with private rights. If a private Act is passed authorising interference with private property or private rights, the rights of private individuals *may* be invaded without any notice having been previously given to them by the applicants to Parliament, and notwithstanding that they have no opportunity given them of opposing the passing through Parliament of the Act conferring these powers (l). "When an Act of this description is obtained by a company for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and I think that they ought not to be held to possess any right unless it be given in plain terms or arise as a necessary inference from the language used" (m). If the language of the private Act is at all ambiguous, "every presumption," said Best, C.J., in *Scales v. Pickering* (n), "is to be made against the company and in favour of private property, for if such a construction were not adopted, Acts would be framed ambiguously in order to lull parties into security." For "it is to be observed," as Tindal, C.J., said in *Parker v. Great Western Ry.* (o), "that the language of these Acts of Parliament is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Therefore Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." "If there be any reasonable doubt," said Lord Cottenham in *Webb v. Manchester and Leeds Ry.* (p), "as to the extent of the powers [given to the railway company in their private Act], they must go elsewhere and get enlarged powers, but they will get none from me by way of construction of their Act of Parliament." "A company," said Lord Ellenborough in *Gildart v. Gladstone* (q), "in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and the public ought not to be charged unless it is clear that it was so intended." In

(k) See p. 248 *ante*, p. 543 *post*.

(l) See p. 547 *post*.

(m) *Scottish Drainage, etc., Co. v. Campbell* (1889), 14 App. Cas. 139, 142, Lord Herschell. Cf. *Lamb v. North Lond. Ry.* (1869), L.R. 4 Ch. App. 522, 528, Selwyn, L.J. *Barton v. Moorhouse*, [1935] A. C. 300.

(n) (1828), 4 Bing. 448, 452.

(o) (1844), 7 Scott (N. R.) 835, 870; cf. *Att.-Gen. v. Barnet District Gas & Water Co.* (1909), 101 L. T. 651, 654, 656, Vaughan Williams, L.J.

(p) (1839), 4 My. & Cr. 116, 120; cited in *Dowling v. Pontypool Ry.* (1874), L. R. 18 Eq. 714.

(q) (1809), 11 East 675, 685.

Stourbridge Canal (Proprietors) v. Wheeley (r), the plaintiffs' canal had been made under 16 Geo. 3, c. 28, and an action was brought to recover compensation from the defendants for using the plaintiffs' canal in a manner not strictly contemplated in their Act. In deciding against the plaintiffs' claim, Lord Tenterden said as follows: "The canal having been made under the provisions of an Act of Parliament the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this, that any ambiguity in the terms of the contract must operate against the adventurers and in favour of the public, and the plaintiffs can claim nothing that is not *clearly* given by the Act." In *River Wear Commissioners v. Adamson* (s), Lord Blackburn said: "The first inquiry for your lordships is, are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters (or as it is commonly called, an Act local and personal and public) from that which would be put on similar words in a general Act? To some extent I think we are. If in a local and personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters and which the committee would not (if it did its duty) have allowed to be introduced into such an Act, I think the Judges would be justified in putting almost any construction on the words which would prevent its having that effect."

Acts imposing a charge on private persons strictly construed. The same considerations apply to Acts purporting to impose a charge on private persons. "I have always understood with reference to private Acts as contradistinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual, it must be so imposed in clear and express terms, and not left to implication" (t).

In construing a private Act of Parliament clear and unequivocal words are necessary to deprive persons of the right to do what they were doing for reward at the passing of the Act (u).

Clauses for the protection of the public construed broadly. If in a private Act clauses are introduced to preserve general rights, such clauses will be construed so as to protect such rights as far as possible. Thus, in *Clowes v. Staffordshire Potteries, etc., Co.* (x), it appeared that a company had been empowered by a private Act to construct waterworks. The Act contained a clause protecting generally all rights which riparian owners possessed before the passing of the Act,

(r) (1831), 2 B. & Ad. 792.

(s) (1877), 2 App. Cas. 753, 766.

(t) *Scottish Drainage, etc., Co. v. Campbell* (1889), 14 App. Cas. 139, 149, Lord Fitzgerald.

(u) *Bournemouth-Swanage Motor Road & Ferry Co. v. Harvey & Sons*, [1929] 1 Ch. 686, 697, Scrutton, L.J.; *Langham v. City of London Corporation*, [1949] 1 K. B. 208.

(x) (1873), L. R. 8 Ch. App. 125, 139.

and it was held that such a clause prevented the company from fouling a stream from which they were empowered to take water. "If a public company," said Mellish, L.J., "or any private individuals, obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness."

Railway, canal and public utility works Acts.

6. In *Blakemore v. Glamorgan Canal Co.* (y), Lord Eldon said as to Railway and Canal Acts: "When I look upon these Acts of Parliament I regard them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them" (z).

Conditional powers given by Railway, etc., Acts as Parliamentary contracts. In *Lee v. Milner* (a), Alderson, B., speaking of the powers given by such Acts said: "These Acts have been called Parliamentary bargains made with each of the landowners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each landholder has a right, therefore, to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else." And in *R. v. York and North Midland Ry.* (b), the Court said: "It is said that a railway Act is a contract on the part of a company to make the line, and that the public are a party to that contract and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railways Acts, in our opinion, are not contracts, and ought not to be construed as such: they are what they profess to be, and no more; they give conditional powers which, if acted upon, carry with them duties, but which, if not acted upon, are not either in their nature or by express words imperative (c) on the companies to whom they are granted. Those who come for such Acts of Parliament do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do."

Acts relating to the construction of railways, gasworks, waterworks, or the like, are not merely Parliamentary bargains with the private persons whose property they affect, and the differences between their

(y) (1832), 1 Myl. & K. 154, 162.

(z) This rule was applied by holding that powers given by the Act of entering on the soil of another to execute works must be exercised once for all and within the time limited by the Act. Cf. *Taylor v. St. Helens Corporation* (1877), 6 Ch. D. 264, 278.

(a) (1837), 2 Y. & C. (Ex.) 611, 618.

(b) (1853), 1 E. & B. 858, 864, 869, Jervis, L.J. Cf. *Att.-Gen. for British Columbia v. Esquimalt and Nanaimo Ry.*, [1950] A. C. 87, at p. 110, per Lord Greene.

(c) As to when permissive Acts are obligatory, see p. 263. ante.

statutory provisions and private stipulations have been considered in a great many cases (*d*). In *Davis v. Taff Vale Ry.* (*e*), the company sued Davis in respect of rates and tolls alleged to be due under section 23 of the Barry Dock and Railways Act, 1888, and they contended that the Act was simply a contract between two railway companies regulating exchange of traffic, and did not affect rates to be paid by the public. On this Lord Halsbury said: "It is said that these are private Acts. So they are; they are Acts which give great powers, and in giving which the Legislature has generally been careful to look to the rights of the public. It would be a very singular course of legislation to commit the interest of the traders of the district to be dealt with by two railway companies, so that if they agreed, the trader should have no remedy. Conveyance of goods by a railway company established by Act of Parliament is a public right, and the obvious meaning to my mind of the whole of these arrangements is that unless the Taff Vale Company carry at the rates which I have described as the prescribed rates, they shall have a competing line permitted; but this does not in the least degree interfere to my mind, with the remedy of the trader himself, who, when he has been overcharged, should refuse to pay, or recover back when he has paid an overcharge prohibited by the Act of Parliament." And Lord Watson said: "The provisions of a railway Act, even where they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and force, not from the agreement of the parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios* which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract, made between two companies, is scheduled and confirmed by the Act; because in such a case the form of the enactment might be held to indicate that it is to operate as a contract and not otherwise" (*f*). In *Bristol Guardians v. Bristol Waterworks* (*g*), owing to a draftsman's blunder the water company was enabled to make any charge it pleased for supplying water to certain workhouses. In the Court of Appeal Fletcher Moulton, L.J., thought the only course open to the defendants was to get the blunder in their Act corrected by an amending Act. In the House of Lords Earl Loreburn said: "It is quite true that in construing private Acts the rule is to interpret them strictly against the

(*d*) See *Corbett v. S. E. Ry.*, [1905] 2 Ch. 280, 286.

(*e*) [1895] A. C. 542, 550, 552.

(*f*) See *Corbett v. S. E. Ry.*, [1906] 2 Ch. 12, 20, C.A.; *Joseph Crosfield & Sons v. Manchester Ship Canal Co.*, [1905] A. C. 421.

(*g*) [1912] 1 Ch. 846, 870; [1914] A. C. 379, 387.

promoters and liberally in favour of the public, but a Court is not at liberty to make laws however strongly it may feel that Parliament has overlooked some necessary provision or even has been overreached by the promoters of a private bill."

Private Acts regarded as contracts to be construed like contracts. It seems correct to describe those parts of an Act which affect particular persons as contracts between them and the promoters of the Act, whether the clauses were inserted, as is often the case, by mutual agreement, or were forced upon the promoters by the Legislature (*h*). If this view is adopted, we must simply ascertain what is the actual contract, as contained within the four corners of the Act, and we must disregard anything that may have been said during the negotiation of the contract, or while the Bill was being discussed before a Parliamentary committee. In *Steele v. Midland Ry.* (*i*), Wood, V.-C., said: "I cannot be assisted in the construction of the Act by knowing what took place before the committee when both parties were arguing face to face until at length the committee came to a conclusion." Nor will plans, which may have been exhibited (whether in pursuance of any standing order of either House of Parliament or not) with regard to the work, in any way bind the parties unless those plans are ultimately incorporated into the Act itself (*k*). In *North British Ry. v. Tod* (*l*), plans and sections of an intended railway had, in pursuance of standing orders of the House of Lords, been exhibited, and it appeared that according to these plans the railway would intersect the approach to the respondent's house at a point about 500 feet from his lodge and at a depth of about fifteen feet below the surface. The respondent, relying on these representations, abstained from opposing the appellants' Bill in Parliament. After the Bill had received the Royal assent the appellants served the respondent with a notice, by which it appeared that they intended to carry their railway across his approach in a totally different manner from that described in the plans and sections which they had deposited; consequently, the respondent applied to the Court for an injunction to restrain them from carrying out their undertaking in a manner different from that

(*h*) *Countess of Rothes v. Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, 707, Lord Watson; *Davis v. Taff Vale Ry.*, *supra*, p. 552, Lord Watson.

(*i*) (1865) L. R. 1 Ch. App. 275, 282.

(*k*) *Herron v. Rathmines and Rathgar Water Commissioners*, [1892] A. C. 498, 502, Halsbury, L.C.; cf. *Att.-Gen. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & S. 423; *Att.-Gen. v. G. E. Ry.* (1872), L. R. 7 Ch. App. 475, 482.

(*l*) (1846), 12 Cl. & F. 722, 733, Lord Cottenham; 738-739, Lord Campbell; followed in *Beardmer v. L. & N. W. Ry.* (1849) 1 Mac. & G. 112. Before this decision the rule to be applied was open to some doubt. "I found that what had certainly been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord Eldon in *Heriot's Hospital Case* (1844), 2 Dow. (H. L.) 301": *North British Ry. v. Tod*, *supra* at p. 732, Lord Cottenham. Where there was no special enactment permitting the diversion of a road, though shown in the deposited plan, it was held that the plan was not equivalent to a Parliamentary licence to divert or alter the road; *R. v. Wycombe Ry.* (1867), L. R. 2 Q. B. 310, 321, Blackburn, J.

described in their plans. The Court below granted the injunction prayed for, but the House of Lords, on appeal, reversed this decision, and, in delivering his opinion, Lord Cottenham said as follows: "The plans which are required to be exhibited by the Standing Orders, except so far as they are made part of the Act, are entirely out of the question as I apprehend. . . . When we are looking to what the rights of the parties are, we can only look to the Act of Parliament by which these rights are regulated. Plans or proceedings previous to the enactment can have no effect upon the enactments themselves." And Lord Campbell added: "What is the construction of the Act of Parliament? The Act of Parliament must be considered as overruling and doing away with everything that has taken place prior to the time when the Act of Parliament passed, and renders the representation or proposal of the company, pending the Act of Parliament, of no avail. Many cases have occurred in the common law Courts in which it has been held that everything that takes place before a written contract is signed by the parties is entirely to be disregarded in construing the contract by which they are bound. If the respondent had been cautious . . . he would have had a special clause introduced into the Act to protect his rights. . . . But he abstained from introducing any such clause, and therefore he must be considered as having acceded to the company having all the powers which the Act confers upon them, under which they are at liberty to deviate in the manner proposed."

Surrounding circumstances may be considered. But the Court of interpretation may consider the subject-matter with which Parliament was dealing, and the facts existing with respect to which Parliament was legislating. "But though all negotiations previous to the Act, or the original form of the Bill must be dismissed, yet it is true that the subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act" (m).

Classification of contents of railway, etc., Acts. Acts regulating railway, canal, water and gas companies contain provisions of several kinds. The principle of these are—

- (1) Those affecting the internal constitution of the company.
- (2) Those regulating the dealings of the company with passengers or owners of goods to be carried.
- (3) Those affecting the Crown or local authorities.
- (4) Those empowering the acquisition of lands.
- (5) Those for the protection of particular interests.

General scheme of private Act not controlled by clauses in nature of bargains with individuals. Every private Act passed for the purpose of carrying out some general scheme (as, for instance, the making of

"(m) *Per* Lord Halsbury in *Herron v. Rathmines, etc., Commissioners*, [1892] A. C. 498, 502.

a railway or the supplying of a certain district with water or gas) must contain general clauses, by which the general scheme is regulated, such coming under heads (1), (2), and (3) above. "Many of the provisions of Acts of Parliament constituting companies," said Bramwell, L.J., in *Att.-Gen. v. Great Eastern Ry. (n)*, "are not provisions as between the companies and the public, but agreements among the shareholders *inter se*, which constitute their agreement of partnership, their instrument of settlement."

As to heads (2), (3), the Act is substantially public and general. "Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to the necessary support of the thing constructed shall accompany the right to make and maintain it. More especially would this seem reasonable when the thing to be constructed is one of public advantage and utility, in which the public are to have rights. The maxim of good sense and law so stated becomes applicable with more or less stringency, according to the scope of the Act of Parliament. On the other hand, the Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property should be confiscated for the benefit of others or of the public without any compensation being provided for him in respect of what is taken compulsorily from him" (o).

Clauses empowering the taking of land. The clauses under head (4) do not affect the public at large, but only the owners of lands through or near which the works of the company are carried. They are sub-divided into two kinds of clauses—namely, those which are in the nature of private bargains with certain particular individuals, which we may call *particular* clauses; and those by which the object to be effected is regulated, which may be termed *general* clauses. In construing private Acts the *particular* clauses ought not to have any effect upon the construction of the *general clauses* under any of the heads indicated. This rule of construction was enunciated by Lord Cairns in *East London Ry. v. Whitchurch (p)*, and was adopted by the House of Lords. "These clauses," said he, "are in the nature of private arrangements, put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties have made. They are not put in by the Legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause" (q).

Clauses for protection of particular interests. As to head (5) private

(n) (1879), 11 Ch. D. 449, 501.

(o) *L. N. W. Ry. v. Evans*, [1893] 1 Ch. 16, 28, Bowen, L.J., and *Davis v. Taff Vale Ry.*, [1895] A. C. 542, p. 538 *ante*.

(p) (1875), L. R. 7 H. L. 81, 89.

(q) As to the effect of such clauses, see p. 539 *ante*.

Acts often contain provisions for the protection of particular interests. The effect of clauses of this kind was explained by Lord Phillimore (then Lord Justice Phillimore) in *Att.-Gen. v. North Eastern Ry.* (r) where, discussing an order of the Light Railway Commissioners made under the Light Railways Act, 1896, whereby a company was authorised to construct a light railway which was to be carried over a canal then vested in a navigation company, by an opening or swing bridge, he said: "It is said that the use of the words 'for the protection of' shows that the whole section is for enforcing a bargain between the two companies in which the public had no concern, and which either party to the bargain may waive. Very likely its origin was in a bargain, but none the less the order may confer rights on third parties and the public, which cannot now be got rid of. The Legislature or the substitute for the Legislature in these matters, has to consider, and does consider, the interests of the public. There are third parties to such a bargain, and it may well be that public considerations entered into the framing of the clause. Anyhow, if the clause is there, its origin is unimportant. For this we have the authority of the House of Lords in *Davis & Sons v. Taff Vale Ry.* (s). True in that case the clause may not have been a bargain. It may well be that the promoting company, and the opposing company, could not get near enough, and that the committee had to decide between them. If so it was a decision *inter partes*, and yet it gave rights to the public. No doubt the words 'for the protection of' must be borne in mind in construing the section. They are a condensed preamble. One effect they apparently have is to give the protected person or body a right to sue for the enforcement without invoking the Attorney-General. This seems decided by the case of *Joseph Crosfield & Sons v. Manchester Ship Canal Co.* (t). Otherwise, the right to sue would be doubtful if the decision of Warrington, J., in *Att.-Gen. v. Pontypridd Waterworks Co.* (u) be correct. But when it is intended that a protective clause should be capable of waiver there is a well-known form of drafting according to which the protection is to apply unless otherwise agreed. Section 28 of this order, which is a protective section, accordingly has the qualification 'unless with the previous consent of.' So sub-section (2) of section 29 has the phrases already quoted. In sub-section (4) there is no such qualification. In its inception it may have been framed and agreed to or it may have been decided upon a dispute *inter partes* by the Board of Trade (we know not which it was) as a protection to the Navigation Company. But it may well be that one reason for framing it in its present absolute form was care for the interests of those navigating the canal, as well as for the Navigation Company itself. At any rate there it is, and the Attorney-General has a right to call upon the Courts to enforce it."

(r) [1915] 1 Ch. 905, 917.

(s) [1895] A. C. 542.

(t) [1905] A. C. 421.

(u) [1908] 1 Ch. 388.

Agreements scheduled to a private Act. It is a common practice to schedule to private or special Acts agreements made between the undertakers and other persons, and to declare such agreements valid and binding between the parties thereto (x). The effect of so doing seems to be to make the agreements part of the statute, and usually (y) to exclude the contention that they are *ultra vires* as being beyond the powers of the contracting parties, or void as containing stipulations which would be illegal or void but for the statute (z): for the agreements by incorporation into the statute cease to be voluntary contracts and acquire statutory effect. And in *Sevenoaks Ry. v. L. C. & D. Ry.* (a), Jessel, M.R., held that by an agreement so confirmed Parliament had ample power to create rights unknown to the ordinary law and incapable of creation by an ordinary contract (b). In such cases the ordinary canons of construction of contracts must be subordinate to those applying to the construction of statutes. But where the statute simply authorises or requires the making of the agreement *in futuro*, the above-stated considerations do not apply to its construction when the agreement is made (c).

Inclosure Acts.

7. *Public, local or personal.* Inclosure Acts until the end of the last century were usually treated as purely private Acts. Since then they have been treated as public, local, and personal, and the effect of legislation giving control to the Minister of Agriculture and Fisheries over inclosures (d) is to make them of public concern.

* The general scheme of these Acts is to allot to the lord of the manor a certain portion of the land to be inclosed in full compensation for his rights in the soil of the other parts and to allot to each of the commoners a portion of the land in lieu of his rights of common over the lands inclosed. The canons for their construction, when they deal with the rights of owners of the surface soil and the subjacent minerals, and with rights of sporting over the lands inclosed, have often been the subject of litigation. Questions of the construction of Inclosure Acts have frequently come before the Courts, and although each case, of course, depends on the wording of the particular Act, there is sufficient similarity between them to warrant the deduction of some general principles applicable to all such Acts.

(x) *E.g., Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Westgate and Birchington Water Co. v. Powell-Cotton* (1916), 85 L.J. Ch. 459.

(y) But see *Corbett v. S. E. Ry.*, [1906] 2 Ch. 12, 21, Cozens-Hardy, L.J. (contract *ultra vires* as prohibited by Act).

(z) See *Caledonian Ry. v. Greenock and Wemyss Bay Ry.* (1874), L. R. 2 H. L. (Sc.) 347; *R. v. Midland Ry.* (1887), 19 Q. B. D. 540, 550, Wills, J.

(a) (1879), 11 Ch. D. 625.

(b) *E.g.*, as offending against the rule against perpetuities; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; [1901] 2 Ch. 37, 50.

(c) *G. W. Ry. v. Waterford and Limerick Ry.* (1881), 17 Ch. D. 493.

(d) See the Commons Act, 1899; Ministry of Agriculture and Fisheries Act, 1919.

Surface owner's right to support as against mineral owner. Farwell, J., thus stated (e) the effect of the decisions as to the right of the owner of the surface to support from the mineral owner: "The surface owner has by common law the right to have proper support for his surface so as to prevent its subsidence (f). If the mineral owner contests this right, the burden is on him to displace it. The right can only be displaced by express words or by necessary implication from the words used in the Act. Words, however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate if the words used are fairly applicable to the ordinary course of working and nothing more: see Lord Selborne's judgment in *Love v. Bell* (g). The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support (h). So also is the presence of a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury to buildings or other injury resulting from subsidence is in favour of the destruction of the right. But this is a question of construction, for, as stated by Lord Davey in *New Sharlston Collieries Co. v. Earl of Westmorland* (i), the existence of an express provision for compensation for letting down the surface does not necessarily authorise the mineowner to let it down. The question is one of construction in each case, and the same principles apply whether the document be a grant, lease, or Inclosure Act. The latter is nothing more than a statutory agreement between the parties, or, as Lord Selborne puts it (k), 'whether it be more or less that, upon the inclosure, is allotted to the lords can make no difference, it is equally a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award.' It is important to ascertain whether the mineral owner's rights are merely reserved or whether they are newly created by grant. In the latter case there is more ground than in the former for the argument that the

(e) *Bishop Auckland Industrial Co-operative Society, Ltd. v. Butterknowle Colliery Co. Ltd.*, [1904] 2 Ch. 419, 424-426; affirmed in the Court of Appeal, [1904] 2 Ch. 430, and in the House of Lords, [1906] A. C. 305, *sub nom. Butterknowle Colliery Co. Ltd. v. Bishop Auckland Industrial Co-operative Co. Ltd.*

(f) *Warwickshire Coal Co. v. Coventry Corporation*, [1934] 1 Ch. 488, C. A.; *Wath-upon-Deane U. D. C. v. John Brown & Co.*, [1936] 1 Ch. 172, and cf. Halsbury's Laws of England (2nd edn.), vol. iv, pp. 669-679.

(g) (1884), 9 App. Cas. 286, 289, 290, 291; and see *S. C.* (1883), 10 Q. B. D. 547, 562, where Baggallay, L.J., said: "It is essential that the intention of the Legislature should be expressed in language as to which there can be no reasonable question or doubt."

(h) See *Bell v. Earl of Dudley*, [1895] 1 Ch. 182; *L. N. W. Ry. v. Evans*, [1893] 1 Ch. 16.

(i) Reported, [1904] 2 Ch. 443, n.; *Thomson v. St. Catharine's College, Cambridge*, [1919] A. C. 468.

(k) *Love v. Bell* (1884), 9 App. Cas. 286, 289, 290.

ordinary common law right of support has been displaced (*l*). The reservation of the lord's rights to be enjoyed in as full and ample a manner as if the Act had not been passed is not equivalent to a reservation free from the common law liability to leave support merely because the only liability before the Act was to leave sufficient pasturage, but is to be read as subject to the ordinary maxim '*Sic utere tuo ut alienum non lædas*,' so that *mutatis mutandis*, it becomes subject to the substituted ownership right of support in lieu of the extinguished commoners' right of pasturage; and, accordingly, if there were no such commonable rights, no substituted right of support can be maintained" (*m*).

These rules of interpretation are not applied so as to deprive the owner of the minerals of his common law right of necessity to break the surface for the purpose of working the minerals, even when no compensation clause is inserted (*n*).

Reservation of manorial rights. Inclosure Acts commonly contain a clause reserving to the lord of the manor his manorial rights and all rights of shooting, fishing and fowling within the manor. A clause of this kind is in derogation of the right of freehold given by the Act to the allottees of the lands inclosed and must therefore be construed most strongly against the party claiming under it and its effect is, unless clearly expressed otherwise, to preserve to the lord of the manor such rights only as were of a manorial character, that is were in him *qua* lord of the manor, and not as owner of the soil of the wastes. Accordingly, those sporting rights which he formerly enjoyed over the wastes of the manor merely as owner of the soil of the wastes are not preserved to him by the reservation clause, but only such rights if any as he enjoyed *qua* lord of the manor by virtue of a right of free warren (*o*). A right of shooting over or fishing in lands declared by the Act to be the freeholds of the allottees can only be reserved to the lord of the manor in express words or by necessary implication (*p*).

(*l*) *Duke of Buccleuch v. Wakefield* (1870), L. R. 4 H. L. 377; *Love v. Bell*, (1884) 9 App. Cas. 286, 291, 292. And see the Scottish case *Buchanan v. Andrew* (1873), L. R. 2 H. L. (Sc.) 286.

(*m*) *Gill v. Dickinson* (1880), 5 Q. B. D. 159.

(*n*) *Hayles v. Pease and Partners, Ltd.*, [1899] 1 Ch. 567.

(*o*) *Sowerby v. Smith* (1874), L. R. 9 C. P. 524, 532.

(*p*) *Duke of Devonshire v. O'Connor* (1890), 24 Q. B. D. 468; *Ecroyd v. Coulthard*, 1898] 2 Ch. 358.

CHAPTER II

EFFECT OF PRIVATE ACTS

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Persons bound by private Acts.

1. *Strangers not bound.* "It is said in the books," said Wigram, V.-C., in *Dawson v. Paver* (a), "that public Acts bind all the Queen's subjects. But of private Acts of Parliament it is said that they do not bind strangers, unless by express words or necessary implication the intention of the Legislature to affect the rights of strangers is apparent in the Act." "If in a local and personal Act," said Lord Blackburn in *River Wear Commissioners v. Adamson* (b), "we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the committee would not (if it did its duty) have allowed to be introduced into such an Act, I think the Judges would be justified in putting almost any construction on the words that would prevent its having that effect." And "the Courts will take every means of defeating an attempt by a private Act to affect either the rights of the Crown or of other persons who have not been brought in" (c). In *Lucy v. Levington* (d), it was said that "every man is so far a party to a private Act as not to gainsay it, but not so as to give up his interest. 'Tis the great question in *Barrington's Case* (e). The matter of the Act there directs it to be between the foresters and the proprietors of the soil, and therefore

(a) (1847), 5 Hare 415, 434.

(b) (1877), 2 App. Cas. 743, 766. In that case, at p. 765, Lord Blackburn gives an account of the systematising of clauses in Bills of this kind by the action of the authorities of both Houses of Parliament; cf. p. 536 ante.

(c) *Great Northern, Piccadilly and Brompton Ry. v. Att.-Gen.*, [1909] A. C. 1, 6, Lord Loreburn, L.C. He added: "I desire to say for myself that I am not satisfied in regard to these private Acts of Parliament, that there are sufficient means either for securing accurate drafting, or for safeguarding the rights of persons other than those who are concerned in the private legislation." See also his observations in *Postmaster-General v. National Telephone Co.*, [1909] A. C. 269, 272.

(d) (1671), 1 Ventr. 175, 176.

(e) (1611), 8 Co. Rep. 136.

it shall not extend to the commoners to take away their common. Suppose an Act says, Whereas there is a controversy concerning land between A and B it is enacted that A shall enjoy it: this does not bind others, though there be no saving clause, because it was only intended to end the difference between these two."

All parties named in Act are bound. A private Act binds all parties named in it, whether or not they concurred in obtaining it. This was much discussed in the case of *Earl of Shrewsbury v. Scott* (f). In 1719 a private Act (6 Geo. 1, c. 29) was obtained to settle the Shrewsbury estates, and by section 8 of that Act it was enacted that the estates should always follow the title and should be inalienable; but the section contained a proviso that, if the first or any other son of the then Earl or any the heirs male of any such son, should abjure the Catholic religion and become a Protestant, his disability to alienate should cease. In 1856 the then Earl, being tenant in tail, alienated the estates, and one of the grounds relied upon by the alienee was that the private Act of 1719 was not binding upon any tenant in tail, the tenant in tail in 1719 not having been a party to the Act. As to this argument, Cockburn, C.J., said: "We have been reminded indeed that a private Act of Parliament has been said upon high authority to be little more, if anything, than a private conveyance between those who are parties to it, and to a certain extent I agree in that proposition. Recitals in a private Act could never bind persons who were not parties to the Act (g). Provisions, however general in their terms, could not be held to affect the rights of parties who were not before Parliament, and whose rights were never intended to be affected. . . . Thus, if a tenant for life should obtain power to convey an estate in fee, no Court would hold that it could have been the intention of the Legislature to bind a remainderman who was not a party to the Act or named in it. . . . But if an Act of Parliament in positive and express terms professes to affect, and does affect, the rights of parties named in it . . . it is quite impossible, as it seems to me, to maintain that a Court of law is not bound to give effect to the provisions of such an Act although such parties may not have concurred in passing it."

Whether or not they had notice of its introduction into Parliament. "The authority of a statute is supreme and if the statute affects the rights of persons not before Parliament, whether by oversight or from disregard of the rules of the House, Courts must carry it into effect. A private Act has as much force as any public Act" (h). This statement must however be taken subject to the qualification stated by Lord Blackburn in *River Wear Commissioners v. Adamson* (supra) p. 546. Therefore a private Act binds all parties named in it, whether they have had notice of its introduction into Parliament or not. In *Edinburgh, etc., Ry. v. Wauchope* (i), the Lord Ordinary had appended

(f) (1859), 6 C. B. (N.S.) 1, 157, affirmed *ibid.* p. 221.

(g) As to recitals in a public Act, see p. 38-41 *ante*.

(h) Halsbury Laws of England (2nd ed.), vol. xxxi, p. 544.

(i) (1842) 8 Cl. & F. 710 720, 724.

to his interlocutor a note to the effect "that he is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of the private Act for regulating the Edinburgh Railway Company . . . and that he should strongly be inclined to hold that rights previously established could not be taken away by a private Act, of which due notice was not given to the party meant to be injured." As to this Lord Cottenham said: "It does appear that in the course of the argument in the Court below an impression did exist that an Act of Parliament might or might not be binding on parties according as there might or might not be proof that the individual to be affected by it had had notice of the Act while in progress through the two Houses.—[Lord Brougham: That the Standing Orders for the protection of private rights not having been complied with, the authority of the Act of Parliament itself would be affected.]—There is no foundation for such an idea, but such an impression appears to have existed in Scotland, and I express my clear opinion upon it, that no such erroneous idea may exist in future." And Lord Campbell added: "His Lordship (the Lord Ordinary) seems to have been of opinion that if this Act did receive the construction that it would clearly take away from Mr. Wauchope the rights to this tonnage it would have had that affect only if due notice had been given him of the introduction of the Bill into the House of Commons, but that that notice not having been given to him, it could not have such effect, but became wholly inoperative. I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a Court of Justice can do is to look to the Parliamentary Roll. If from that it should appear that a Bill had passed both Houses and received the royal assent, no Court of justice can inquire into the mode in which it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses."

All persons dealing with a company created by the Act are bound. "If need was," said Erle, C.J., in *Cahill v. London & N. W. Ry.* (k), "I should be prepared to hold that, where a company is created by Act of Parliament, having privileges and rights granted to them, and liabilities and duties imposed upon them in respect of their incorporation, parties dealing with them must be taken to be cognisant of the provisions of the Act of Parliament granting those privileges and rights and imposing those duties and liabilities, although it be a private Act" (l). This *dictum* of Erle, C.J., which was acquiesced in by Willes, J., and Byles, J., is now well established as a statement of the law.

(k) (1861), 10 C. B. (N.S.) 154, 172.

(l) It equally binds the company in dealing with such persons: *Davis v. Taff Vale Ry.*, [1895] A. C. 542, 548, Lord Halsbury. Most of such Acts contain a clause requiring the undertakers to keep a copy at their office for inspection on demand.

Inconsistency between two private Acts.

2. A provisional order confirmed by Parliament authorising an electric undertaking came into operation on June 27, 1892. It gave power to a municipal corporation to purchase the undertaking compulsorily, on terms of using or transferring to the undertakers such an amount of corporation stock as would "produce by the interest thereon an annuity of 5 per cent." on capital properly expended. Another provisional order coming into operation on June 28, 1892, took away a power possessed but not exercised by the corporation to issue irredeemable stock. The statutes which confirmed the two orders received the royal assent on the same day, June 27, 1892. North, J., held that the fact that the two Acts passed on one day did not absolutely constrain him to hold that they must be read as consistent. And upon the express terms of the two orders, one of which came into force *on* the day of the passing of the confirmatory statute, the other *from and after* that date, he held that the order which came later into force took away the power to issue irredeemable stock recognised in the earlier order. This consequently had the effect of putting in abeyance the powers of purchase given by the earlier order (m).

Repeal of special by general Act.

• 3. In the absence of any indication of intention on the part of the Legislature, local Acts are not repealed by public general Acts (n).

"There is another rule which has been laid down, which is a good rule if it is properly applied, namely, that where there has been a particular rule established by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal the particular law or particular custom if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together, the first, the particular law, standing as an exceptional proviso upon the general law. And I think, on

(m) *Mayor, etc., of Sheffield v. Sheffield Electric Light Co.*, [1898] 1 Ch. 203.

(n) *Fitzgerald v. Champneys* (1861), 30 L. J. Ch. 777; see pp. 348 *et seq. ante*. The rule applicable in such cases is well stated in a Canadian case, *Ontario, etc., Rail. Co. v. Canadian Pacific Rail. Co.* (1887), 14 Ont. Rep. 432, 445, by Ferguson, J., quoting Lord Westbury, L.C., in *Re The Westminster Bridge Act*, 1859 (1864), 33 L. J. Ch. 372, 376, viz., that where there are provisions in a special Act and a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act. Cf. *London, Chatham & Dover Ry. v. B. W. for Wandsworth* (1873), L. R. 8 C. P. 185, 189, Keating, J.; *Upper Canada College v. Toronto* (1916), 37 O. L. R. 665, 670. For instances of a special Act being cut down by a general Act, see *Charing Cross, etc., Electricity Supply Corporation v. Woodthorpe* (1903), 88 L. T. 772; *Whitechapel District Board of Works v. Crow* (1901), 84 L. T. 595.

consideration, and after looking into the cases which have been referred to, that although the doctrine itself is sound, it was misapplied in this case" (o).

"It is well settled that where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of the authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf, and it is for the promoters to say that they have given him all that he can want, or something just as good as that which the Act required them to give, or even something still better, if he only knew his own interest. It is enough for him to show that the thing which is offered is not the thing which the Act said he was to have. It is too late to call for a new deal at that stage of the game, nor is it, I think, within the province of any tribunal to remodel arrangements sanctioned by Parliament, or to release conditions which the Legislature has thought fit to impose" (p).

Repeal of public Act by private Act.

4. There is no positive rule (q) which prevents a public general Act from being repealed, either expressly or by implication, by a private or local and personal Act; but, as Malins, V.-C., said (r), "a Court ought never to presume an intention to modify or repeal a public Act by a private one," for private Acts "demand peculiar vigilance, lest public laws be lightly set aside for the benefit of particular persons or places" (s).

In *City and South London Ry. v. London County Council* (t), it was held that the Act regulating the undertaking of the company exempted them from the Metropolitan Building Acts (u). In *Uckfield U. D. C. v. Crowborough District Water Co.* (x), it was held that the special Act of the Water Company passed in 1897 did not exempt their undertaking from the building clauses of the Public Health Act, 1875, on the ground that the special Act could not be regarded as inconsistent with the general Act (y). In *Surrey Commercial Dock*

(o) *Garnett v. Bradley* (1878), 3 App. Cas. 944, 967, Lord Blackburn.

(p) *Herron v. Rathmines and Rathgar Water Commissioners*, [1892] A. C. 498, 523, Lord Macnaghten.

(q) In May (15th ed.), p. 850, it is stated that 7 & 8 Geo. 4, c. 31, was amended by 2 & 3 Will. 4, c. lxxxviii (local and personal), and that in 1864 the City of London Tithes Acts repealed a public Act of Henry VIII. Cf. *Coates v. R.*, [1900] A. C. 217.

(r) *Perring v. Trail* (1874), L. R. 18 Eq. 88, 91.

(s) See May, *supra*.

(t) [1891] 2 Q. B. 513.

(u) Cf. *London and Blackwall Ry. v. Limehouse Board of Works* (1856), 26 L. J. Ch. 164; *London County Council v. London School Board*, [1892] 2 Q. B. 606.

(x) [1899] 2 Q. B. 664.

(y) See also *London County Council v. Wandsworth and Putney Gas Co.* (1900), 82 L. T. 562; *Hornsey U. D. C. v. Smith*, [1897] 1 Ch. 843; *Heston and Isleworth U. D. C. v. Grout*, [1897] 2 Ch. 306; *Ashton-under-Lyne Corporation v. Pugh*, [1898] 1 Q. B. 45, 49; *Lodge v. Mayor, etc., of Huddersfield*, [1898] 1 Q. B. 847; *Moran & Co. Ltd. v. Marsland*, [1909] 1 K. B. 744, and p. 345 *ante*.

Co. v. Mayor, etc., of Bermondsey (z), it was held that the powers of interference and control over buildings given by section 76 of the Metropolis Management Act, 1855, were inconsistent with the powers conferred upon a dock company by their special Acts of 1864 and 1894, and that to the extent of the inconsistency the special Acts overrode the general Act. So on a question as to how compensation for land compulsorily acquired by a local authority was to be assessed, whether under a general statute, Acquisition of Land (Assessment of Compensation) Act, 1919, or under a local Act of 1917 incorporating the Land Clauses Act, it was held that the Act of 1919 did not apply and that the land was to be assessed by the Lands Clauses Act as modified by the local Act. The general language of the Act of 1919 was not to be construed as affecting the special provisions of the local Act (a). It is more accurate to describe the effect of a private on a public Act by saying that the former creates an exception or exemption than by saying that it effects a repeal.

Effect of local Act on taxing Act. A local and personal Act does not repeal public Acts relating to taxation. The Mersey Docks and Harbour Act, 1858, s. 284, provided for the application of moneys collected, levied, borrowed, and raised or received under the Act, and concluded: "Except as aforesaid, such moneys shall not be applied by the Board for any other purpose whatsoever." Section 285 provided for liability to local and parochial rates, but the Act was silent as to imperial taxation. It was thereupon contended in *Mersey Docks and Harbour Board v. Lucas* (b) that the Mersey Docks and Harbour Board were exempted from liability to income tax beyond the sum paid as interest on the debt incurred for the acquisition and working of their property. Lord Selborne said: "In advising the House in *Mersey Docks v. Cameron* (c), and *Jones v. Mersey Docks* (d), my noble and learned friend [Lord Blackburn], who then delivered the opinion of the Judges, which was adopted by the House in a case where there was no such special clause, said: 'There are no negative words prohibiting the application of the rates to payment of the poor rates, and we think, in conformity with the decision in *Tyne Commissioners v. Chirton* (e), that enactments directing that the revenue shall be applied to certain purposes and no other are directory only, and mean that, after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these [the

(z) [1904] 1 K. B. 474. This decision was expressly stated not to be inconsistent with *Charing Cross, etc., Electricity Supply Corporation v. Woodthorpe* (1903); 88 L.T. 772, ante p. 549, n. (n). Cf. *Bostock v. Ramsey Urban Council*, [1900] 2 Q. B. 616.

(a) *Blackpool Corporation v. Starr Estates Ltd.*, [1922] 1 A. C. 27. Cf. *R. v. Minister of Health, Ex. p. Villiers*, [1936] 2 K. B. 29.

(b) (1883), 8 App. Cas. 891, 901, 902.

(c) (1865), 11 H. L. C. 443, 480.

(d) *Ibid.*

(e) (1859), 1 E. & E. 516.

specified] purposes.'” After expressing full concurrence with the opinion quoted, Lord Selborne added: “Even independently of the sound general doctrine laid down in the passage which I have read . . . it seems to me that the view expressed in the Court of Appeal (*f*) is perfectly right, and that it would be a very strange thing indeed, and wholly inconsistent with the principles, which are well established, as to the construction of Acts of Parliament, and I may say more especially of local and personal Acts of this nature, if duties given to the Crown, taxes imposed by the authority of the Legislature by public Acts for public purposes, were held to be taken away by general words of this kind in a local and personal Act, and an Act in which the Crown is nowhere mentioned so as to be bound by it. The addition of an express saving clause as to parochial and local rates cannot, in my opinion, prevent the application to public taxes of the principles which, upon the enacting words, would otherwise have been applicable.” The same learned lord pointed out another difficulty, *viz.*, that income tax is imposed in one sense in each year by the Continuance Acts, or the Acts varying the rate from time to time, and in another sense by the Income Tax Act, 1842, which is referred to and incorporated in subsequent Acts; so that the tax may be said to be imposed subsequently to any given local Act under which exemption is claimed. “It (income tax) has expired and been revived, and re-enacted over and over again; every revival and re-enactment is a new Act” (*g*).

On the same principle, an exemption from local taxation given by a public Act will not readily be held to have been taken away by a subsequent local Act. In *Mayor, etc., of London v. Netherlands Steamboat Co.* (*h*), it was held that sections 169, 187 of a local Act, the City of London Sewers Act, 1848, did not repeal an exemption from rates given by two public statutes of 1812 and 1832, authorising the erection of a new custom house and the sale of the site of the old custom house (*i*).

There are two cases of *Associated Newspapers, Ltd. v. London Corporation* in both of which section 51 of the 7 Geo. 3, c. 37, was in question. This section also formed the subject of the *Sion College Case* in 1900 (*k*). It exempted adjoining owners of lands reclaimed from the Thames from “all taxes and assessment whatsoever.” In

(*f*) Not reported.

(*g*) *Income Tax Commissioners v. Pemsel*, [1891] A. C. 532, 591, Lord Macnaghten. In *Midland Ry. v. Att.-Gen.*, [1902] A. C. 171, an unsuccessful attempt was made to show that stock created under a special Act did not fall within the Stamp Act, 1891. See also *Stewart v. Thames Conservancy*, [1908] 1 K. B. 893.

(*h*) [1906] A. C. 263, 268, Lord Halsbury. Cf. *Associated Newspapers v. London Corporation*, [1916] 2 A. C. 429, *infra*.

(*i*) In the case of two local Acts the rule seems to be different. See *Sion College Case*, [1901] 1 K. B. 617, and the cases there cited, and *Jonas v. St. Dunstan's Churchwardens* (1906), 23 T. L. R. 13. The *Sion College Case* so far as it applied only to taxes existing at the date of the Act and others substituted for them was overruled in *Associated Newspapers Ltd. v. London Corporation*, [1916] 2 A. C. 429.

(*k*) [1900] 2 Q. B. 581, [1901] 1 Q. B. 617.

the first of the *Associated Newspaper Cases* (l) the question was whether these owners were liable for education expenses paid by the Common Council of the City from the poor rate. It was held by the Court of Appeal and the House of Lords that the exemption covered the charges in question. The former Court doubted if the *Sion College Case*, which decided that the exemption applied only to taxes and assessments existing at the date of the Act of 1827 or others substituted for them, was a subsisting authority since the remarks of Lord Davey in *Mayor, etc., of London v. Netherlands Steamboat Co.* (m). In the House of Lords, Lord Parker of Waddington reserved his opinion on the *Sion College Case*. In the second of the *Associated Newspaper Cases* (n) the question was as to liability to the rate levied under the City of London (Union of Parishes) Act, 1907, the modern equivalent of the consolidated rate under the City of London Sewers Act of 1848. The Court of Appeal held there was no exemption and Phillimore, L.J., said: "Taking the latter case (i.e., the first *Associated Newspaper Case* above), the broad principle laid down is that where there is an old rate, the exemption attaches no matter how many new charges are put upon it. Where there is a new rate there is no exemption." The House of Lords reversed this decision. The exemption granted by the Act of Geo. 3, extended to all local taxes and assessments whether present or future except so far as any Act imposing a new tax qualified or repealed the exemption. The *Netherlands Steamboat Case* (supra) did not impliedly repeal the exemption so far as the consolidated rate was concerned. Hence the occupiers were exempt. The *Sion College Case* was overruled so far as it applied only to taxes in existence at the date of the Act or others substituted for them. The *dictum* of Bailey, J., was also overruled (o).

Repeal of private Act by private Act.

5. "It is a rule of law," Turner, L.J., is reported to have said in *Birkenhead Docks Trustees v. Birkenhead Dock Co. & Laird* (p), "that one private Act of Parliament cannot repeal another, except by express enactment: there is no such enactment in the defendants' Act in reference to those of the plaintiff and the latter are I consider unaffected by the former. I have said that in my opinion, the rule of law as to the construction of such Acts is not to do anything which would be in effect a repeal of any clause, unless in a subsequent Act some words are inserted which would operate as an express repeal of the former (q). That appears to be the rule as laid down by the

(l) [1913] 2 K. B. 281; revd. [1914] 2 K. B. 603; affd. [1915] A. C. 674, 697.

(m) [1906] A. C. 263, 271.

(n) [1915] 3 K. B. 128, 147; [1916] 2 A. C. 429; followed in *Re Winget, Ltd.*, [1924] 1 Ch. 550.

(o) In *R. v. London Gas Light & Coke Co.* (1828), 8 B. & C. 54, 62.

(p) (1854), 23 L. J. Ch. 457, 458.

(q) This *dictum* of Turner, L.J., is not contained in the report of the case in 4 De G. M. & G. 742.

learned Judge Jenkins in *Sir Fouk Grevil's Case* reported in his work called 'Eight Centuries of Reports,' the Third Century, (1) where speaking of the statute 14 Ed. 3 . . . and then referring to the Acts of Parliament 45 Ed. 3, and 10 R. 2 . . . the author says 'These last general Acts did not repeal the said statute 14 Ed. 3, for it is a special statute' and further on he adds *Generalia specialibus non derogant*." It is doubtful whether this *dictum* would now be accepted. The rule is certainly not a rule of law, but at most a canon of construction; and it is submitted that one private Act is repealed by another by necessary implication if the two are completely inconsistent. And this view seems to have been accepted by North, J., in *Mayor, etc., of Sheffield v. Sheffield Electric Light Co. (r)*.

Relief against private Act if obtained by fraud.

6. It is said by Blackstone (s) that a private Act, "when obtained upon fraudulent suggestions, hath been relieved against." This proposition is adopted by Cruise (t), who, however, points out (u) that formerly any Act of Parliament, private as well as public, "was considered as an assurance of so high a nature that, although it was obtained by fraud, yet it could not be relieved against by any of the Courts of law or equity, but only by the power that made it, that is, by Parliament." In support of Blackstone's proposition, Cruise gives an abstract of *Mackenzie v. Stuart*, decided by the House of Lords on appeal from the Court of Session in 1754; and cites *Biddulph v. Biddulph*, decided by the House of Lords in 1790. In neither of these cases, however, is the doctrine discussed, nor are any reasons given for the decision. The question has never been seriously discussed in any modern case. In *Stead v. Carey (x)*, Creswell, J., said: "It is something new to impeach an Act of Parliament by a plea stating that it was obtained by fraud;" and in *Waterford Ry. v. Logan (y)*, the Court refused to allow a plea alleging that "the Act was obtained by the fraud of the plaintiffs" (z). The proper course to adopt when a Bill or clause is smuggled through Parliament is to bring in a Bill to repeal the clause in question (a). And the decision of the Judicial Committee in *Labrador Co. v. R. (b)*, seems finally to dispose of the notion that it is any ground for disregarding a statute to say that the Legislature was deceived. Their Lordships stated that if a mistake had been made only the Legislature could correct it, for a Court of Law must give effect to an enactment as it stands.

(r) (1898) 1 Ch. 203. See p. 549 *ante*, and see Maxwell (9th ed.), 192.

(s) 2 Comm. 346.

(t) Digest, vol. v. tit. Private Act, s. 50, p. 28 (edit. 1824).

(u) L. c., s. 49.

(x) (1845), 1 C. B. 496, 516.

(y) (1850), 14 Q. B. 672.

(z) See also *dicta* of Willes, J., in *Lee v. Bude, etc., Ry.* (1871), L. R. 6 C. P. 576, 580, cited p. 66 *ante*.

(a) A clause as to Sunday processions in the Eastbourne Improvement Act, 1885, was repealed in 1892 by 55 & 56 Vict. c. cxciii, which was promoted by the Salvation Army.

(b) [1893] A. C. 104, 123; see p. 40 *ante*.

Secret and fraudulent agreement for obtaining a private Act. It is also said that any agreement which may be made to disarm opposition to a Bill, and which is intended by both parties to the agreement to be kept secret, will be held invalid as being a fraud upon the Legislature, and contrary to the principles of public policy. In *Vauxhall Bridge Co. v. Earl Spencer* (c), it appeared that in order to induce the proprietors of Battersea Bridge not to oppose a private Act for which the Vauxhall Bridge Company were applying to Parliament, the plaintiffs paid into the hands of trustees a certain sum of money, which was to be handed over to the defendants, the proprietors of Battersea Bridge, as soon as the Act was passed. No opposition was made to the Bill by the defendants, and the Act was passed, but the plaintiffs then disputed the right of the defendants to have this sum of money handed over to them, on the ground that the agreement not to oppose the passing of the Act was invalid, as being a fraud upon the Legislature and contrary to public policy. And so it was held by the Court. "This agreement," said Plumer, V.-C., "was secretly made during the pendency of the Bill in Parliament, and that secrecy is the great ground of objection to it. . . . The object of the agreement was to prevent an opposition to the Bill in Parliament, and it was to be concealed from the Legislature. Such an underhand agreement was a fraud upon the Legislature and contrary to principles of public policy. The contract therefore is invalid" (d). But it seems from the case of *Lord Howden v. Simpson* (e), that the mere fact of an agreement of this kind being kept secret is not sufficient to invalidate it; it must also be proved that there was an intention to deceive the Legislature by making some false representation to it. The agreement was to the effect that if the plaintiff would withdraw his opposition to the defendant's railway Bill, they would endeavour to deviate their proposed line and would pay the plaintiff £5,000 and compensation and damages, if any, if there were no deviation. It appeared, said the Court, "that the plaintiff and the defendant had agreed together to represent to the Legislature the line of road described in the then pending Bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt and act on, another, if obtained. . . . The supposed fraud [therefore] consists in an intention to make a false representation to the Legislature, by stating the object of the adventurers to be to carry one line into effect and concealing the design of applying for another. . . . It is not enough that the existence of such an agreement was at the time of entering into it, and afterwards, in fact, kept secret from the Legislature and all the world besides by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the

(c) (1817), 2 Madd. 356, 366.

(d) Reversed by Lord Eldon on appeal (1821), Jac. 64, on other grounds.

(e) (1839), 10 A. & E. 793, 817, 818, in the Exchequer Chamber reversing the Queen's Bench, which held the agreement fraudulent; affirmed by the House of Lords (1842), 9 Cl. & F. 61.

intention of the parties to it at the time of making it, and if there did not *then* exist the intention of deceiving the Legislature by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties making the subsequent concealment." There was no fraud and nothing to prevent the plaintiff from recovering. So also in *Shrewsbury Ry. v. London and North Western Ry.* (*f*), it appeared that a Bill had been brought in for the purpose of enabling one company to grant to another company a lease of certain lines of railway, and this Bill was opposed by a third company, but ultimately an agreement was come to by which, in consideration of the third company withdrawing their opposition, the other two companies engaged to conduct their traffic in a certain specified way, so as not to prejudice the interests of the third company. On a bill being filed to enforce this agreement, it was contended that the agreement was a fraud upon Parliament. "I cannot, however," said Lord Cottenham, "see how that can be the case. . . . It cannot be said that the parties could not come to a private arrangement between themselves. The opposition to a Bill must be supposed to be for the purpose of guarding the particular interest of the parties opposing. If these objects are attained by any private arrangement, it is no fraud on Parliament. Every landowner with whom an agreement is made before the parties go to Parliament has his opposition to the Bill neutralised or destroyed or withdrawn in consideration of that arrangement."

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Restraint by the courts of petition to introduce private Bill.

In several older cases, and in one modern one, this question has been considered. In some respects they resemble *Lord Howden v. Simpson* (*ante* p. 555); an alleged agreement with a possible opponent of the Bill has been broken and the aggrieved party seeks to restrain further proceedings on the Bill. In *Ware v. Grand Junction Water Co.* (*g*) a shareholder attempted to restrain the defendants from proceeding with a Bill promoted by them. The Vice-Chancellor granted the injunction but Lord Brougham, L.C., dissolved it. In *Heathcote v. North Stafford Rail Co.* (*h*) a party agreed to withdraw his opposition to a Bill if the promoters would complete their line in a certain way. They found themselves unable to do so and gave notice of their intention to apply for an Act authorising the abandonment of the scheme. Again the Vice-Chancellor granted an injunction which was dissolved by Lord Cottenham, L.C. In *Steele v. North Metropolitan Ry.* (*i*) a railway company agreed to purchase the land of a landowner and had a clause to that effect inserted in their Act. The landowner thereupon withdrew his opposition. Subsequently the company applied to Parliament to enable them to abandon the

(*f*) (1849), 2 Macn. & G. 324, 352.

(*g*) (1831), 2 Russ. & My. 470, 483.

(*h*) (1850), 2 Macn. & G. 100, 109.

(*i*) (1867), L. R. 2 Ch. App. 237.

branch line which affected the land in question and to repeal the clause. Lord Chelmsford, L.C., refused to restrain this application. The Court had power to do so but it was difficult to conceive a case where it would be done. In *Re L. C. & D. Ry. Arrangement Act*, (1867) (k), shareholders opposed a bill for conferring additional powers on the railway company and for enabling the affairs of the company to be referred to arbitration. Stuart, V.-C. granted the shareholders an injunction. On appeal Selwyn, L.J., said the Court had power to restrain any person from making an improper application to Parliament but it is difficult to conceive or define what are the cases in which would be proper for the Court to exercise that power and Giffard, L.J., said: "We have the authority of Lord Brougham, Lord Cottenham, Lord Chelmsford and the present Lord Chancellor (Lord Hatherley) one and all agreeing that, though there may be some special cases under which by the jurisdiction *in personam* an injunction of this description may be granted, yet that in no case which has ever come before the Court has such an injunction been granted nor has anyone ventured to say in what particular case such an injunction would be granted." Finally in 1942 in *Bilston Corporation v. Wolverhampton Corporation* (l) the defendants lodged a petition to oppose the plaintiffs' bill in breach of their obligation entered into with the plaintiffs' predecessors in title in 1892 and which was confirmed in the defendants' Act of 1893. Simonds, J., held that the opposition to the Bill was a breach of this obligation but the matter was one for Parliament and not for the Court, though it had jurisdiction, to intervene by injunction. The learned Judge said he declined to be the first Judge to take such a step. And so the matter rests.

Creation of new jurisdiction by private Act.

7. Although the Legislature can undoubtedly in a private Act by specific enactment and in terms, make any provision it pleases for a particular state of circumstances, it was held in *Green v. Mortimer* (m), that Parliament cannot by a private Act in a specific and particular case confer upon a Court of justice a jurisdiction to do something which is beyond the general jurisdiction of that Court, and any provision in a private Act professing to do so would be inoperative.

The case arose on a private Act called Carew's Estate Act, 1857, whereby certain lands and stock were vested in trustees to pay the yearly income to C., and it was enacted that the Court of Chancery might, so far as the rules of law and equity and the jurisdiction of the Court would admit, make orders so as to ensure that the life estate of C. should be inalienable. By an agreement with one Ford, C. covenanted to charge his life interest with the payment of a certain sum of money, but by an order of the Court made subsequently to

(k) (1869), L. R. 5 Ch. App. 671, 679, 682.

(l) [1942] 1 Ch. 391.

(m) (1861), 3 L. T. 642.

the agreement, it was ordered that the whole of the income payable to C. for his life should be inalienable by him, and from time to time as it became payable should be applied solely for his exclusive personal enjoyment. Upon this a bill was filed by the plaintiff on Ford's behalf against the trustees, submitting that, notwithstanding the order, Ford was entitled to a charge in accordance with the agreement made by C. with Ford. To this bill the trustees demurred, and contended that C. took, not a life estate *simpliciter*, but an inalienable life estate, which it was plainly the object of the Legislature to confer upon him. But the Lord Chancellor (Lord Campbell), in giving judgment against the demurrer, expressed his great surprise that such an Act should appear upon the statute book; it must have been passed *per incuriam*. The Act contained something which was quite absurd, and in terms gave the Court power to do that which was quite impossible; for it was clear that the Court could have no power to do that which the Act professed to empower it to do. The order by which the declared intentions of the Act were to be carried out was *ultra vires* of the Court, for there could be no power to give such a qualification to C.'s interest. There must be the same power in C. to encumber his estate as if the Act had never passed. But this decision stands by itself as a warning and not as a precedent. A very large number of Acts, usually described as private but more correctly styled local, do create new jurisdictions and new offences (*n*). In *Cairns v. Linton* (*o*) the Court of Session felt constrained to hold that a local Act had given the Sheriff of Midlothian a large jurisdiction in the rest of Scotland as to execution of process; and in *Caledonian Ry. v. Greenock and Wemyss Bay Ry.* (*p*) it was held that a clause in an agreement scheduled to and confirmed by a special Act ousted the jurisdiction of the ordinary Court and compelled the parties to have recourse to arbitration (*q*). On the other hand a bylaw made by the Wheat Commission to the effect that the Arbitration Act, 1889 shall not apply to proceedings under the Wheat Act, 1932 was held *ultra vires* and invalid (*r*). Under general Acts the parties are often obliged to resort to arbitration either as a condition precedent to or in substitution for an action (*s*).

Waiver of rights given by private Act.

8. In *Great Eastern Ry. v. Goldsmid* (*t*) a question was raised as to an Act of 1 Edw. 3 which was treated as falling into the same category,

(*n*) *E.g.*, the Eastbourne Improvement Act, 1885, *ante*, p. 554, n. (*a*). Bills of this kind are submitted to a special committee under instructions to excise clauses inserted for this purpose which are unnecessary or inexpedient.

(*o*) (1889), 16 *Rettie* (Justiciary) 84.

(*p*) (1874), L. R. 2 H. L. (Sc.) 347.

(*q*) *Cf. G. W. Ry. v. Halesowen Ry.* (1883), 52 L. J. Q. B. 473.

(*r*) *R. W. Paul Ltd. v. Wheat Commissioners*, [1937] A. C. 139.

(*s*) *Crisp v. Banbury* (1832), 8 Bing. 394; *Norwich Corporation v. Norwich Tramways*, [1906] 2 K. B. 119; *Cayzer, Irvine & Co. v. Board of Trade*, [1927] 1 K. B. 269.

(*t*) (1884), 9 App. Cas. 927.

or a similar category, with what are now called local and personal or private Acts, and it was held that the grant of a market therein contained was a *jus introductum* for the particular benefit of the City of London, and not a general law for the general benefit of all the subjects of the realm (u); and that it fell within the general principle of law *unusquisque potest renunciare juri pro se introducto* (w), a principle not only of ancient but also of modern application, applicable even where Acts of Parliament have been passed of a much more public character. In *Toronto Corporation v. Russell* (x) this rule was applied to the provisions of the Ontario Assessments Acts of 1892, 1897 and 1903, entitling the owner of lands to notice in writing of intention to sell the land for arrears of taxes, and it was held that the owner could waive and had waived strict compliance with those provisions (y). In such cases, where the rights given have been only private rights, unless there has been also in the Act a clause excluding a power "to contract out," (z) it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced.

(u) *Ib.*, pp. 936, 937, Lord Selborne.

(w) *Ante*, pp. 235, 248.

(x) [1908] A. C. 493.

(y) See also *Hampstead Corporation v. Midland Ry.*, [1904] 2 K. B. 802; *Countess of Rothes v. Kirkcaldy Water Commissioners* (1882), 7 App. Cas. 694; and p. 539 *ante*.

(z) *Equitable Life Association of U. S. A. v. Reed*, [1914] A. C. 587, 595. Cf. Merchant Shipping Act, 1894, s. 156 (2); Agricultural Holdings Act, 1948, s. 65, and Halsbury's Law of England (2nd ed.), vol. vii, p. 158.

APPENDIX A

SOME POPULAR TITLES OF STATUTES

SOME Acts have acquired popular titles other than the short titles given them by the Legislature.

Statutes passed since 1861 usually have statutory short titles given them by one of the earlier or later sections. When such title exists, it is usually indicated in the first column of the Official Chronological Table of Statutes prefixed to the Official Index to the statutes now annually published, or in the body of that Index.

The Short Titles Act, 1896, gives statutory short titles to many Acts to which the Legislature had not previously given short titles and provides that those Acts may be cited by their short titles without prejudice to any other mode of citation. The Act also gives (section 2 (1)) a number of collective titles for convenient reference in new statutes to a series of Acts which are *in pari materia*. A further list of short titles was contained in the Statute Law Revision Act, 1948 (11 & 12 Geo. 6, c. 62), Sched. II. This Appendix contains only a list of popular titles, *i.e.*, those not given by the Short Titles Act, 1896, or the Statute Law Revision Act, 1948, or by the Act itself or any later enactment.

Aberdeen's (Lord) Act (5 Geo. 4, c. 87). Entail.

Acts of Oblivion (12 Car. 2, c. 11; 13 Car. 2, stat. 1, c. 15).

Act of Submission (23 Hen. 8, c. 14).

„ Supremacy (1 Eliz. c. 1).

Acts of Union (6 Anne, cc. 11, 40 (with Scotland); 39 & 40 Geo. 3, c. 67 (with Ireland)).

Additions, Statute of (1 Hen. 5, c. 5). See 2 Reeves, Hist. Eng. Law, 520; and 46 & 47 Vict. c. 59, s. 7.

Adoptive Acts.—See 56 & 57 Vict. c. 73, s. 7 (1); and 62 & 63 Vict. c. 14, s. 4.

Alien Acts (32 Geo. 3, c. 4; 45 Geo. 3, c. 155; 55 Geo. 3, c. 54 (see 6 L.Q.R., p. 37), and 11 & 12 Vict. c. 20).

Anderson's Act (37 & 38 Vict. c. 15 (Betting)).

Articuli cleri (1315, 9 Edw. 2, stat. 1).

„ *Super chartas* (1300, 28 Edw. 1).

Ashbourne's (Lord) Acts (44 & 45 Vict. c. 49, and 48 & 49 Vict. c. 73).

Assize, Statute of (21 Edw. 1).

Baines' Act (12 & 13 Vict. c. 45).

Bankrupts, Statute of (34 & 35 Hen. 8, c. 4).

Barnard's (Sir John) Act (7 Geo. 2, c. 8).

Bass' Act (27 & 28 Vict. c. 55 (Street Music)).

Bethell's Act (20 & 21 Vict. c. 54).

Bigamy, Statute of (4 Edw. 1).

Birkenhead's (Lord) Acts (Law of Property Acts, 1922—1925).

Black Act (9 Geo. 1, c. 22). See i Lecky, Hist. Eng., 488.

„ Acts. The editions of the Scots Acts published between 1566 and 1597.

See 1 Statt. Realm, p. xlv.

- Blandford's (Lord) Acts (19 & 20 Vict. c. 104; 21 & 22 Vict. c. 24). See *Hughes v. Lloyd* (1889), 22 Q. B. D. 157.
- Bourne's (Sturges) Acts (58 Geo. 3, c. 69; 59 Geo. 3, c. 12).
- Bovill's (Sir W.) Acts (23 & 24 Vict. c. 34 (Petition of Right); 25 & 26 Vict. c. 86 (Lunacy); and 28 & 29 Vict. c. 86 (Partnership)).
- Brougham's (Lord) Acts, (1) 13 & 14 Vict. c. 21 (Interpretation); (2) 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99; 16 & 17 Vict. c. 83 (Evidence); (3) 19 & 20 Vict. c. 96 (Scotch marriages).
- Bryce's Act (49 & 50 Vict. c. 27).
- Bubble Act (6 Geo. 1, c. 18).
- Burke's Act (22 Geo. 3, c. 75).
- Cairns' (Lord) Act (21 & 22 Vict. c. 27).
- Cameron's (Dr.) Act (39 & 40 Vict. c. 26).
- Campbell's (Lord) Acts, (1) 6 & 7 Vict. c. 96; and 8 & 9 Vict. c. 75 (Libel); (2) 9 & 10 Vict. c. 93 (Fatal Accidents Act, 1846); (3) 20 & 21 Vict. c. 83 (Obscene Publications).
- Cardwell's Acts (17 & 18 Vict. c. 31, Railway and Canal Traffic; 34 & 35 Vict. c. 86, Army).
- Catallis felonum, Statutum de (incert. temp.)*.
- Catholic Emancipation Act (10 Geo. 4, c. 7).
- Chemperty, Statute of (33 Edw. 1, stat. 1).
- Charitable Uses (Statute of) (43 Eliz. c. 4).
- Charta de foresta* (25 Edw. 1).
- Circumspecte agatis* (13 Edw. 1).
- Clarendon, Constitutions of, 1164 (10 Hen. 2). See 1 Reeves, Hist. Eng. Law, p. 126.
- Clay's (Sir W.) Act (14 & 15 Vict. c. 14).
- Cockburn's Act (16 & 17 Vict. c. 119) (Betting).
- Confirmatio chartarum*, 1297 (25 Edw. 1).
- Conspiratoribus ordinacio de* (33 Edw. 1, stat. 1).
- „ *statutum de (incert. temp.)*.
- Conventicle Acts (16 Car. 2, c. 4; 22 Car. 2, c. 1).
- Corporation Act (13 Car. 2, stat. 2, c. 1).
- Corresponding Societies Acts (39 Geo. 3, c. 79; 57 Geo. 3, c. 19; 9 & 10 Vict. c. 30).
- Coventry Act (22 & 23 Car. 2, c. 1).
- Cozens-Hardy's Act (54 & 55 Vict. c. 73).
- Cranworth's (Lord) Acts (23 & 24 Vict. c. 11) (Schools); (23 & 24 Vict. c. 145) (Property).
- De Catallis Felonum (stat. incert. temp.)*.
- De Donis Conditionalibus, statutum de* (13 Edw. 1, Stat. West. 2, c. 1).
- Denison's Act (18 & 19 Vict. c. 34).
- Denman's (Hon. G.) Act (28 & 29 Vict. c. 18).
- „ (Lord) Act (6 & 7 Vict. c. 85).
- Ellenborough's (Lord) Act (43 Geo. 3, c. 59) (Bridges).
- Fines, Statute of } 27 Edw. 1. See 2 Reeves, Hist. Eng.
Finibus levatis, statutum de, etc. } Law, p. 131.
- Finlay's Act (53 & 54 Vict. c. 44, Supreme Court).
- Forbes Mackenzie Act (16 & 17 Vict. c. 57).

Foresta, Charta de (25 Edw. 1).

" *Ordinatio de* (34 Edw. 1).

Forrest Fulton's Act (50 & 51 Vict. c. 21, Water Supply).

Fox's Act (32 Geo. 3, c. 60, Libel).

Gagging Acts, The (60 Geo. 3 & 1 Geo. 4, cc. 1, 2, 4, 6, 8, 9).

Gambling Act (14 Geo. 3, c. 48).

Gilbert Acts (17 Geo. 3, c. 53; 21 Geo. 3, c. 66 (Clergy); 22 Geo. 3, c. 83 (Poor)).

Gloucester, Statute of (6 Edw. 1).

Gordon's (Lord) Act (31 & 32 Vict. c. 100, S.).

Greaves' Acts. The Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. cc. 94—100).

Gurney's (Russell) Acts (30 & 31 Vict. c. 35; 31 & 32 Vict. c. 116).

Hall's (Sir Benjamin) Act (18 & 19 Vict. c. 120, Metropolis Management).

Harter Act (U. S.). See *The Rodney*, [1900] P. 112; *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q. B. 408.

Herbert's (Sir Alan) Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 17, Matrimonial Causes).

Hinde Palmer's Act (32 & 33 Vict. c. 46).

Hobhouse's Act (1 & 2 Will. 4, c. 60).

Hogarth Act (8 Geo. 2, c. 13).

Home Drummond Act (9 Geo. 4, c. 58).

Horne Tooke's Act (41 Geo. 3, c. 63).

Ibbetson's (Sir Selwin) Acts (32 & 33 Vict. c. 27; 33 & 34 Vict. c. 29).

Jeofails, Statutes of. See Stroud, *Judicial Dictionary*, "Jeofails"; 3 Reeves, *Hist. Eng. Law*, p. 309.

Jervis' Acts (11 & 12 Vict. cc. 42, 43, 44; and 18 & 19 Vict. c. 57).

Jointures, Statute of (11 Hen. 7, c. 20).

Keating's Act (18 & 19 Vict. c. 67).

Kenilworth, Statute of (51 & 52 Hen. 3).

Kingsdown's (Lord) Act (24 & 25 Vict. c. 114).

Labourers, Statute of (23 Edw. 3). See Reeves, *Hist. Com. Law*, vol. 2, p. 455; vol. 3, p. 587.

Langdale's (Lord) Act (7 Will. 4 & 1 Vict. c. 26, Wills).

Leeman's Acts (30 & 31 Vict. c. 29; 34 & 35 Vict. c. 61). See *Perry v. Barnett* (1885), 14 Q. B. D. 467.

Locke King's Acts (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34). See *Dowdall v. M'Cartan* (1880), 5 L. R. (Ir.) 642.

Locke's Act (23 & 24 Vict. c. 127).

Lord's Day Acts (Sunday Observance Acts) (1 Car. 1, c. 1; 29 Car. 2, c. 7; 21 Geo. 3, c. 49; 3 & 4 Will. 4, c. 31).

Lubbock's (Sir John) Act (34 & 35 Vict. c. 17, Bank Holidays).

Lyndhurst's (Lord) Act (5 & 6 Will. 4, c. 54, Marriage).

Magna Carta (1), 1225 (9 Hen. 3, c. 16).

" " (2), 1297 (25 Edw. 1).

Malins' Acts (18 & 19 Vict. c. 43; 20 & 21 Vict. c. 57).

Marten's Act (42 & 43 Vict. c. 31, Burials).

Michael Angelo Taylor's Act (57 Geo. 3, c. xxix).

Montgomery Act (10 Geo. 3, c. 51, Entail, S.).

Mutiny Acts (1 & 2 Will. & Mar. c. 5, etc.), superseded by the Army Act (44 & 45 Vict. c. 58), and the Army Annual Act of each year.

Northampton, Statute of, 1328 (2 Edw. 3).

North's (Lord) Act (13 Geo. 3, c. 63) (India).

Nullum tempus Acts (9 Geo. 3, c. 16 (E.); 24 & 25 Vict. c. 62 (E.); 48 Geo. 3, c. 47 (I.); 39 & 40 Vict. c. 37 (I.)).

Oblivion, Acts of (12 Car. 2, c. 1; 13 Car. 2, stat. 1, c. 15).

Officio coronatoris, Statutum de (4 Edw. 1). See 1 Pollock & Maitland, Hist. Eng. Law, pp. 519, 571; Coroners' Rolls, Selden Society, vol. 9, p. xxv.

O'Hagan's (Lord) Act (39 & 40 Vict. c. 21).

Onslow's Act (56 Geo. 3, c. 100) (Habeas Corpus). See *Watson's Case* (1839), 9 A. & E. 731, 738.

Palmer Act (The Central Criminal Court Act, 1856).

Patent Medicines Act (42 Geo. 3, c. 56). See *Pharmaceutical Society v. Piper*, [1893] 1 Q. B. 686; *Same v. Armson*, [1894] 2 Q. B. 720.

Peel's Acts (6 & 7 Vict. c. 37), District Churches.

„ „ (7 Geo. 4, c. 64; 7 & 8 Geo. 4, c. 27—29), Criminal Law.

Peto's (Sir Morton) Act (13 & 14 Vict. c. 28).

Pitt Lewis' Act (54 & 55 Vict. c. 43), Forged Transfers.

Pitt's Acts (20 Geo. 3, sess. 2, c. 25, India; 27 Geo. 3, c. 15, Excise).

Pollock's (Sir Frederick) Act (The Customs Act, 1842).

Porteous's (Bishop) Act (21 Geo. 3, c. 49), Sunday Observance.

Poyning's Law (10 Hen. 7, cc. 4, 22). See Irish Statt. Rev. App., and note.

Prærogativa Regis, Statutum de (incert. temp.).

Preliminary Inquiries Act (14 & 15 Vict. c. 49).

Provisors, Statute of, 1350 (25 Edw. 3, stat. 4).

Quia Emptores, 1789 (18 Edw. 1, stat. 1).

Quo Warranto, Statute of (18 Edw. 1, stat. 2).

Rae's (Sir William) Act (9 Geo. 4, c. 29), Circuit Courts, S.

Ragman, Statute of (4 Edw. 1). See 2 Reeves, Hist. Eng. Law, 169.

Reform Acts (*Representation of the People Acts*).

Regiam Majestatem.—The oldest preserved Scots Act. Acts of Parliament of Scotland, vol. 1, p. 233. See Bell, Dict. Law Scot., p. 815 (Watson's ed.).

Regulating Act (13 Geo. 3, c. 63, India). See *Hemchand Devchand v. Azam Sakarlal*, [1906] A. C. 212, 227.

Religiosis, Statutum de (7 Edw. 1, Mortmain).

Romilly's (Sir Samuel) Acts (48 Geo. 3, c. 129; 52 Geo. 3, c. 101).

Rosebery's (Lord) Act (6 & 7 Will. 4, c. 42), Entail, S. See *Gillespie v. Riddell*, [1909] A. C. 133.

Russell Gurney's Acts (30 & 31 Vict. c. 35, and 31 & 32 Vict. c. 116).

„ (Lord John's) Act (6 & 7 Will. 4, c. 85), Marriage.

Rutherford's (Lord) Act (11 & 12 Vict. c. 36), Entail, S.

Rutland (Rothlan), Statute of (12 Edw. 1; 10 Edw. 1, Ruffhead).

St. Leonards' (Lord) Acts ((1) 22 & 23 Vict. c. 35; 23 & 24 Vict. c. 38; (2) 30 & 31 Vict. c. 105).

Scholefield's Act (23 & 24 Vict. c. 84).

Scrope's (Poulett) Act (6 & 7 Will. 4, c. 96), Parochial Assessments.

Selborne's (Lord) Act (37 & 38 Vict. c. 85).

Shaftesbury's (Lord) Acts—(1) The Common Lodging House Acts.

(2) (18 & 19 Vict. c. 86), Liberty of Religious Worship.

Six Acts, The (60 Geo. 3 & 1 Geo. 4, cc. 1, 2, 4, 6, 8, 9).

Staple, Statute of the (27 Edw. 3, stat. 2).

Sturges Bourne's Acts (58 Geo. 3, c. 69; 59 Geo. 3, c. 12).

Style Act, The (24 Geo. 2, c. 33).

Submission, Act of (23 Hen. 8; c. 14).

Talfourd's Acts (1) (2 & 3 Vict. c. 54), Infants; (2) (5 & 6 Vict. c. 45), Copyright.

Taylor's (Michael Angelo) Act (57 Geo. 3, c. xxix).

„ (Peter) Act (34 & 35 Vict. c. 87).

Tenentibus per legem Angliæ, Statutum de (incert. temp.).

Tenterden's (Lord) Acts ((1) Statute of Frauds Amendment Act, 1828, 9 Geo. 4, c. 14; (2) Prescription Act, 1832).

Tests Act (25 Car. 2, c. 2).

Tidd Pratt's Act (6 & 7 Vict. c. 36).

Tippling Act (24 Geo. 2, c. 40); cf. 30 & 31 Vict. c. 142, s. 4; and 51 & 52 Vict. c. 43, s. 182.

Torrens' Acts (1) (31 & 32 Vict. c. 30; 48 & 49 Vict. c. 34).

„ „ (2) Australian Acts for Registration of Title to Land.

Trailbaston, Statute of (*incert. temp.*). *Vide* 2 Reeves, Hist. Eng. Law, 169.

Treasons, Statute of (25 Edw. 3, stat. 5, c. 2).

Triennial Act, 1664 (16 Car. 2, c. 4).

Turner's (Sir G.) Act (13 & 14 Vict. c. 35).

Viris religiosis, Statutum de (7 Edw. 1).

Vouchers, Statute of (20 Edw. 1, stat. 1).

Wagering Act (19 Geo. 2, c. 37).

Wales, Statute of (27 Hen. 8, c. 26).

Walliæ statutum (12 Edw. 1).

Waltham Black Act (9 Geo. 1, c. 22). See *Davis' Case* (1783), 1 Leach C. C. (2nd ed.), 228. Passed because of the depredations of deer stealers at Bishop's Waltham.

Wards, Statute of (28 Edw. 1, stat. 1).

Waste, Statute of (20 Edw. 1, stat. 2).

Westbury's Act (25 & 26 Vict. c. 53), Land Transfer.

Westminster, Statute of, the First (3 Edw. 1).

„ „ the Second (13 Edw. 1).

Whiteboy Acts (1) (I.) (15 & 16 Geo. 3, c. 21; 17 & 18 Geo. 3, c. 36; 27 Geo. 3, c. 15; 36 Geo. 3, c. 32). See *R. v. Barrett* (1886), 18 L. R. Ir. 430.

„ **Acts (2) (U. K.)** (40 Geo. 3, c. 96; 50 Geo. 3, c. 102; 1 & 2 Will. 4, c. 44; 5 & 6 Vict. c. 28).

Wilmot's (Sir Eardley) Act (3 & 4 Vict. c. 77), Grammar Schools.

Winchester, or Winton, Statute of (13 Edw. 1, stat. 2).

Yelverton's Act (21 & 22 Geo. 3, c. 48, Ir.).

York, Statute of (12 Edw. 2, stat. 1).

Young's (Lord) Act (35 & 36 Vict. c. 62), Education (S.).

APPENDIX B

Interpretation Act, 1889

(52 & 53 VICT. c. 63).

An Act for consolidating enactments relating to the Construction of Acts of Parliament and for further shortening the Language used in Acts of Parliament. [30th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows (a):—

Re-enactment of existing Rules.

Rules as to gender and number.

1.—(1) In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears,—

- (a) words importing the masculine gender shall include females; and
- (b) words in the singular shall include the plural, and words in the plural shall include the singular.

(2) The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty.

Application of penal Acts to bodies corporate.

2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

(2) Where under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

Meanings of certain words in Acts since 1850.

3.—In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely,—

The expression "month" shall mean calendar month:

- The expression "land" shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure:

(a) This Act applies to Imperial Acts only. It has been applied to the interpretation of Church Assembly Measures: Interpretation Measure, 1925 (15 & 16 Geo. 5, No. 1).

The expressions "oath" and "affidavit" shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" shall, in the like case, include affirm and declare.

Meaning of "county" in past Acts.

4.—In every Act passed after the year one thousand eight hundred and fifty and before the commencement of this Act the expression "county" shall, unless the contrary intention appears, be construed as including a county of a city and a county of a town.

Meaning of "parish."

5.—In every Act passed after the year one thousand eight hundred and sixty-six, whether before or after the commencement of this Act, the expression "parish" shall, unless the contrary intention appears, mean, as respects England and Wales, a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed (b).

Meaning of "county court."

6.—In this Act, and in every Act and Order of Council passed or made after the year one thousand eight hundred and forty-six, whether before or after the commencement of this Act, the expression "county court" shall, unless the contrary intention appears, mean as respects England and Wales a court under the County Courts Act, 1888.

Meaning of "sheriff clerk," etc., in Scotch Acts.

7.—In every Act relating to Scotland, whether passed before or after the commencement of this Act, unless the contrary intention appears—

The expression "sheriff clerk" shall include steward clerk;

The expressions "shire," "sheriffdom," and "county" shall include any stewardry in Scotland.

Sections to be substantive enactments.

8. Every section of an Act shall have effect as a substantive enactment without introductory words.

Acts to be public Acts.

9. Every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, shall be a public Act and shall be judicially noticed as such, unless the contrary is expressly provided by the Act.

(b) This section was repealed by the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), s. 69, Sched. VIII, but that Act did not extend to Scotland, Northern Ireland or the administrative county of London. S. 68 (4), of that Act provides as follows: "In this and every other Act, whether passed before or after this Act, the expression 'parish' shall unless the contrary intention appears and subject to any alteration of area made on or after [April 1, 1927: s. 68 (1)] by or in pursuance of any Act, mean a place for which immediately before [April 1, 1927] a separate poor rate was or could be made or a separate overseer was or could be appointed, and in this Act also includes, unless the context otherwise requires, any part of a parish being either a contributory place or an area otherwise subject to separate or differential rating."

This section was repealed as regards the Scilly Isles by the Isles of Scilly Order, 1927 (S.R. & O. 1927, No. 59).

Amendment or repeal of Acts in same session.

10.—Any Act may be altered, amended, or repealed in the same session of Parliament.

Effect of repeal in Acts passed since 1850.

11.—(1) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

(2) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation.

New General Rules of Construction.

Official definitions in past and future Acts.

12. In this Act, and in every other Act whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression “the Lord Chancellor” shall, except when used with reference to Ireland only, mean the Lord High Chancellor of Great Britain for the time being, and when used with reference to Ireland only, shall mean the Lord Chancellor of Ireland (c) for the time being.

(2) The expression “the Treasury” shall mean the Lord High Treasurer for the time being or the Commissioners for the time being of Her Majesty’s Treasury.

(3) The expression “Secretary of State” shall mean one of Her Majesty’s Principal Secretaries of State for the time being.

(4) The expression “the Admiralty” shall mean the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral of the United Kingdom.

(5) The expression “the Privy Council” shall, except when used with reference to Ireland only, mean the Lords and others for the time being of Her Majesty’s Most Honourable Privy Council, and when used with reference to Ireland only, shall mean the Privy Council of Ireland for the time being.

(6) The expression “the Education Department” (d) shall mean the Lords of the Committee for the time being of the Privy Council appointed for Education.

(7) The expression “the Scotch Education Department” (e) shall mean

(c) The office of Lord Chancellor of Ireland was abolished by the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), Sched. II, Part II.

(d) Now the Minister of Education: Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 2; Education Act, 1944 (7 & 8 Geo. 6, c. 31), s. 2.

(e) Now the Secretary of State: Reorganisation of Offices (Scotland) Act, 1939 (2 & 3 Geo. 6, c. 20), s. 1 (1).

the Lords of the Committee for the time being of the Privy Council appointed for Education in Scotland.

(8) The expression "the Board of Trade" shall mean the Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations.

(9) The expression "Lord Lieutenant (*f*)," when used with reference to Ireland, shall mean the Lord Lieutenant of Ireland or other chief governors or governor of Ireland for the time being.

(10) The expression "Chief Secretary (*g*)," when used with reference to Ireland, shall mean the Chief Secretary to the Lord Lieutenant for the time being.

(11) The expression "Postmaster General" shall mean Her Majesty's Postmaster General for the time being.

(12) The expression "Commissioners of Woods (*h*)" or "Commissioners of Woods and Forests" shall mean the Commissioners of Her Majesty's Woods, Forests, and Land Revenues for the time being.

(13) The expression "Commissioners of Works (*i*)" shall mean the Commissioners of Her Majesty's Works and Public Buildings for the time being.

(14) The expression "Charity Commissioners" shall mean the Charity Commissioners for England and Wales for the time being.

(15) The expression "Ecclesiastical Commissioners (*k*)" shall mean the Ecclesiastical Commissioners for England for the time being.

(16) The expression "Queen Anne's Bounty" shall mean the Governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy.

(17) The expression "National Debt Commissioners" shall mean the Commissioners for the time being for the Reduction of the National Debt.

(18) The expression "the Bank of England" shall mean, as circumstances require, the Governor and Company of the Bank of England or the Bank of the Governor and Company of the Bank of England.

(19) The expression "the Bank of Ireland" shall mean, as circumstances require, the Governor and Company of the Bank of Ireland, or the Bank of the Governor and Company of the Bank of Ireland.

(20) The expression "consular officer" shall include consul-general, consul, vice-consul, consular agent, and any person for the time authorised to discharge the duties of consul-general, consul, or vice-consul.

Judicial definitions in past and future Acts.

13. In this Act and in every other Act whether passed before or after the commencement of this Act, the following expressions shall, unless the

(*f*) As regards Northern Ireland, the Governor of Northern Ireland: Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, Sess. 2, c. 2), s. 2, Sched. II, Part II.

(*g*) As regards Northern Ireland, The Appropriate Minister: General Adaptation of Enactments (Northern Ireland) Order, 1921 (S.R. & O. 1921, No. 1804), Art. 4.

(*h*) Now the Commissioners of Crown Lands: Forestry (Title of Commissioners of Woods) Order, 1924 (S. R. & O. 1924, No. 1370).

(*i*) Now Minister of Works: Ministry of Works (Transfer of Powers) (No. 1) Order, 1945 (S. R. & O. 1945, No. 991).

(*k*) Now the Church Commissioners: Church Commissioners Measure, 1947 (10 & 11 Geo. 6, No. 2), s. 18 (2).

contrary intention appears, have the meanings hereby respectively assigned to them, namely (1):—

(1) The expression "Supreme Court," when used with reference to England or Ireland, shall mean the Supreme Court of Judicature in England or Ireland, as the case may be, or either branch thereof.

(2) The expression "Court of Appeal," when used with reference to England or Ireland, shall mean Her Majesty's Court of Appeal in England or Ireland, as the case may be.

(3) The expression "High Court," when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland, as the case may be.

(4) The expression "court of assize" shall, as respects England, Wales, and Ireland, mean a court of assize, a court of oyer and terminer, and a court of gaol delivery, or any of them, and shall, as respects England and Wales, include the Central Criminal Court.

(5) The expression "assizes," as respects England, Wales, and Ireland, shall mean the courts of assize usually held in every year, and shall include the sessions of the Central Criminal Court, but shall not include any court of assize held by virtue of any special commission, or, as respects Ireland, any court held by virtue of the powers conferred by section sixty-three of the Supreme Court of Judicature Act (Ireland), 1877.

(6) The expression "the Summary Jurisdiction Act, 1848," shall mean the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders."

(7) The expression "the Summary Jurisdiction (England) Acts" and the expression "the Summary Jurisdiction (English) Acts" shall respectively mean the Summary Jurisdiction Act, 1848, and the Summary Jurisdiction Act, 1879, and any Act, past or future, amending those Acts or either of them.

(8) The expression "the Summary Jurisdiction (Scotland) Acts" shall mean the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Act, past or future, amending those Acts or either of them.

(9) The expression "the Summary Jurisdiction (Ireland) Acts" shall mean, as respects the Dublin Metropolitan Police District, the Acts regulating the powers and duties of justices of the peace or of the police of that district, and as respects any other part of Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act, past or future, amending the same.

(10) The expression "the Summary Jurisdiction Acts" when used in relation to England or Wales shall mean the Summary Jurisdiction (England) Acts, and when used in relation to Scotland the Summary Jurisdiction (Scotland) Acts, and when used in relation to Ireland the Summary Jurisdiction (Ireland) Acts.

(11) The expression "court of summary jurisdiction" shall mean any justice or justices of the peace, or other magistrate, by whatever name called,

(1) This section should be read subject to the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), ss. 38-43, 46, 47, 49 and Sched. VII, and the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S. R. & O. 1923, No. 405). Ireland was divided into Northern Ireland (with a separate system of Government and Judicature) and Southern Ireland. The latter became first the Irish Free State, then Eire (both with Dominion status) and then the Republic of Ireland an independent state: see the Ireland Act, 1949 (12 & 13 Geo. 6, c. 41).

See also the Interpretation Act, 1921 (11 & 12 Geo. 5, c. 4) (Northern Ireland).

to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law.

(12) The expression "petty sessional court" shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the city of London, and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate when sitting in a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

(13) The expression "petty sessional court-house" shall, as respects England or Wales, mean a court-house or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute for such a court-house or place, and where the justices are accustomed to assemble for either special or petty sessions at more than one court-house or place in a petty sessional division, shall mean any such court-house or place. The expression shall also include any court-house or place at which the Lord Mayor of the city of London or any alderman of that city, or any metropolitan or borough police magistrate or other stipendiary magistrate is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

(14) The expression "court of quarter sessions" shall mean the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city, or county of a town, in general or quarter sessions assembled, and shall include the court of the recorder of a municipal borough having a separate court of quarter sessions.

Meaning of "rules of court."

14. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression "rules of court" when used in relation to any court shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court, and as regards Scotland shall include acts of adjournment and acts of sederunt.

The power of the said authority to make rules of court as above defined shall include a power to make rules of court for the purpose of any Act passed after the commencement of this Act, and directing or authorising anything to be done by rules of court.

Meaning of "borough."

15. In this Act and in every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "municipal borough" shall mean, as respects England and Wales, any place for the time being subject to the Municipal Corporations Act, 1882, and any reference to the mayor, aldermen, and burgesses of a borough shall include a reference to the mayor, aldermen, and citizens of a city, and any reference to the powers, duties, liabilities or property of the council of a borough shall be construed as a reference to the powers, duties, liabilities, or property of the mayor, aldermen, and burgesses of the borough acting by the council.

(2) The expression "municipal borough" shall mean, as respects Ireland, any place for the time being subject to the "Municipal Corporations (Ireland) Act, 1840."

(3) [The expression "parliamentary borough" shall mean any borough, burgh, place or combination of places returning a member or members to serve in Parliament, and not being either a county or division of a county, or a university, or a combination of universities.] (m)

(4) The expression "borough" when used in relation to local government shall mean a municipal borough as above defined, [and when used in relation to parliamentary elections or the registration of parliamentary electors shall mean a parliamentary borough as above defined.] (m)

Meaning of "guardians" and "union."

16. In this Act and in every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "board of guardians (n)" shall, as respects England and Wales, mean a board of guardians elected under the Poor Law Amendment Act, 1834, and the Acts amending the same, and shall include a board of guardians or other body of persons performing under any local Act the like functions to a board of guardians under the Poor Law Amendment Act, 1834.

(2) The expression "poor law union" shall, as respects England and Wales, mean any parish or union of parishes for which there is a separate board of guardians.

(3) The expression "board of guardians (o)" shall, as respects Ireland, mean a board of guardians elected under the Act of the Session of the first and second years of the reign of Her present Majesty, chapter fifty-six, intituled "An Act for the more effectual relief of the destitute poor in Ireland," and the Acts amending the same, and shall include any body of persons appointed by the Local Government Board for Ireland to carry into execution the provisions of those Acts.

(4) The expression "poor law union" shall, as respects Ireland, mean any townland or place or union, or townlands or places, for which there is a separate board of guardians.

Definitions relating to elections.

17. In every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "parliamentary election" shall mean the election of a member [or members (p)] to serve in Parliament for a county or division of a county, or parliamentary borough or division of a parliamentary borough, or for a university or combination of universities.

(m) Para. (3) and words in italics in para. (4) were repealed by the Representation of the People Act, 1948 (11 & 12 Geo. 6, c. 65), s. 80, Sched. XIII.

(n) Now the council of a county or county borough: Local Government Act 1929 (19 & 20 Geo. 5, c. 17), Sched. X, para 1.

(o) Now the county or county borough: *ibid.*

(p) Words in italics in para. (1) and paras. (2) and (3) were repealed by the Representation of the People Act, 1948 (11 & 12 Geo. 6, c. 65), s. 80, Sched. XIII. See now as to registers of electors, Representation of the People Act, 1949 (12 & 13 Geo. 6, c. 68), s. 7.

(2) [*The expression "parliamentary register of electors" shall mean a register of persons entitled to vote at any parliamentary election (p).*]

(3) [*The expression "local government register of electors" shall mean as respects an administrative county in England or Wales other than a county borough, the county register, and as respects a county borough or other municipal borough, the burgess roll (p)*]

Geographical and colonial definitions in future Acts.

18. In this Act, and in every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "British Islands" shall mean the United Kingdom (q), the Channel Islands, and the Isle of Man.

(2) The expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.

(3) The expression "colony" (r) shall mean any part of Her Majesty's dominions [exclusive of the British Islands and of British India *and of British Burma (s)*], and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

(4) [*The expression "British India" shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any governor or other officer subordinate to the Governor-General of India (t).*]

(5) [*The expression "India" shall mean British India together with any territories of any native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India (t).*]

(6) The expression "Governor" shall, as respects Canada [*and India (u)*], mean the Governor-General, and include any person who for the time being has the powers of the Governor-General, and as respects any other British possession [outside British India (a)], shall include the officer for the time being administering the government of that possession.

(q) See the Royal and Parliamentary Titles Act, 1927, s. 2 (2): "In every Act passed and public document issued after the passing of this Act the expression 'United Kingdom' shall, unless the context otherwise requires, mean Great Britain and Northern Ireland."

(r) In an Act of the United Kingdom passed after December 11, 1931, "colony" does not include a Dominion (*i.e.*, Canada, Australia, New Zealand, South Africa, the Irish Free State, and Newfoundland) or any Province or State forming part of a Dominion (Statute of Westminster, 1931 (22 Geo. 5, c. 4), s. 11).

(s) The words in square brackets were substituted by the Government of India Act, 1935 (25 & 26 Geo. 5, c. 42), s. 311 (4), the words in italics being later repealed by the Burma Independence Act, 1947 (11 & 12 Geo. 6, c. 3), s. 5, Sched. II, Part I.

(t) Paras. (4) and (5) were repealed by the Government of India (Adaptation of Enactments) Order, 1937 (S. R. & O. 1937, No. 230), Art. 2, Sched., Part I. That Order is saved by the Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30), s. 18 (2).

(u) The words in italics and square brackets were repealed by the 1937 Order noted above.

(a) The words in square brackets were added by the 1937 Order noted above.

(7) The expression "colonial legislature" and the expression "legislature," when used with reference to a British possession, shall respectively mean the authority, other than the Imperial Parliament or Her Majesty the Queen in Council, competent to make laws for a British possession.

Special definitions relating to India.

18A.—(1) In this Act and in every other Act, whether passed before or after the commencement of this Act,—

- (i) the expression "British possession," when used in relation to British territories in India, shall, unless the contrary intention appears, mean British India as a whole, and references, in whatever words, to territories of the Crown abroad shall as respects India be construed accordingly;
- (ii) the expression "Governor" shall, when used in relation to British India as a whole or to India as a whole, mean the Governor-General;
- (iii) the expression "Governor-General" shall, when used in relation to British India or to India,—
 - (a) in relation to the period between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation of India, mean the Governor-General in Council;
 - (b) in relation to any period after the commencement of the said Part III, be construed as including a reference to the Governor of a Province in India acting within the scope of any authority given to him under Part VI of the said Act;
- (iv) the expression "Indian legislature" and, when used in relation to British India or to India, the expression "Legislature" shall mean the authority, other than the Imperial Parliament, competent to make laws for British India, or for the relevant part of British India.

(2) This section applies for the interpretation of the Government of India (Adaptation of Acts of Parliament) Order, 1937, but it does not apply for the interpretation of the Government of India Act, 1935, [or the Government of Burma Act, 1935] nor, save as aforesaid, for the interpretation of any Order in Council made under either of those Acts, notwithstanding that that Order may provide generally that this Act shall apply for the interpretation thereof as it applies for the interpretation of an Act of Parliament (b).

Meaning of "person" in future Acts.

19. In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.

(b) This section was added by the Government of India (Adaptation of Acts of Parliament) Order, 1937 (S. R. & O. 1937, No. 230), Art. 2, Sched., Part I. The words in italics in subs. (2) were repealed by the Burma Independence Act, 1947 (11 & 12 Geo. 6, c. 3), s. 5 (3), Sched. II, Part I.

Meaning of "writing" in past and future Acts.

20. In this Act and in every other Act whether passed before or after the commencement of this Act expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

Meaning of "statutory declaration" in past and future Acts.

21. In this Act, and in every other Act, whether passed before or after the commencement of this Act, the expression "statutory declaration" shall, unless the contrary intention appears, mean a declaration made by virtue of the Statutory Declarations Act, 1835.

Meaning of "financial year" in future Acts.

22. In this Act and in every Act passed after the commencement of this Act the expression "financial year" shall, unless the contrary intention appears, mean as respects any matters relating to the Consolidated Fund or moneys provided by Parliament, or to the Exchequer, or to Imperial taxes or finance, the twelve months ending the 31st day of March.

Definition of "Lands Clauses Acts."

23. In any Act passed after the commencement of this Act, unless the contrary intention appears,—

The expression "Lands Clauses Acts" shall mean—

- (a) as respects England and Wales, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Lands Clauses Consolidation Act, 1869, and the Lands Clauses (Umpire) Act, 1883, and any Acts for the time being in force amending the same; and
- (b) as respects Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, and any Acts for the time being in force amending the same; and
- (c) as respects Ireland, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Railways Act (Ireland), 1851, the Railways Act (Ireland), 1860, the Railways Act (Ireland), 1864, and the Railways Traverse Act, and any Acts for the time being in force amending the same.

Meaning of Irish Valuation Acts.

24. In any Act passed before or after the commencement of this Act the expression "Irish Valuation Acts" shall mean the Acts relating to the valuation of rateable property in Ireland.

Meaning of "ordnance map."

25. In this Act and in every other Act, whether passed before or after the commencement of this Act, the expression "ordnance map" shall, unless the contrary intention appears, mean a map made under the powers conferred by the Survey (Great Britain) Acts, 1841 to 1870, or by the Survey (Ireland) Acts, 1825 to 1870, and the Acts amending the same respectively.

Meaning of "service by post."

26. Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve," or the expression "give" or "send," or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Meaning of "committed for trial."

27. In every Act passed after the commencement of this Act, the expression "committed for trial" used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, whether the person is committed in pursuance of section twenty-two or of section twenty-five of the Indictable Offences Act, 1848, or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognisance to appear and take his trial before a judge and jury.

Meanings of "sheriff," "felony," and "misdemeanour" in future Scotch Acts.

28. In this Act and in every Act passed after the commencement of this Act, unless the contrary intention appears—

The expression "sheriff" shall, as respects Scotland, include a sheriff substitute:

- The expression "felony" shall, as respects Scotland, mean a high crime and offence:

The expression "misdemeanour" shall, as respects Scotland, mean an offence.

Meaning of "county court" in future Irish Acts.

29. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression "county court" shall, as respects Ireland, mean a civil bill court within the meaning of the County Officers and Courts (Ireland) Act, 1877.

References to the Crown.

30. In this Act and in every other Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown.

Construction of statutory rules, etc.

31. Where any Act, whether passed before or after the commencement of this Act, confers power to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, expressions used in the instrument, if it is made after the commencement of this Act, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power.

Construction of provisions as to exercise of powers and duties.

32.—(1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

(3) Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws.

Provisions as to offences under two or more laws.

33. Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence (c).

Measurement of distances.

34. In the measurement of any distance for the purposes of any Act passed after the commencement of this Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

Citation of Acts.

35.—(1) In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained.

(2) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office.

(c) "It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so held in any case and it does not so provide in the [Interpretation] Act." *Per cur. R. v. Thomas*, [1950] K. B. 26; cf. *R. v. Morris* (1867), L. R. 1. C. C. R. 90.

(3) In any Act passed after the commencement of this Act a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

“ Commencement.”

36.—(1) In this Act, and in every Act passed either before or after the commencement of this Act, the expression “ commencement,” when used with reference to an Act, shall mean the time at which the Act comes into operation.

(2) Where an Act passed after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

Exercise of statutory powers between passing and commencement of Act.

37. Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

Effect of repeal in future Acts.

38.—(1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or,
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or
- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or
- (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

- (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

Supplemental

Definition of "Act" in this Act.

39. In this Act the expression "Act" shall include a local and personal Act and a private Act.

Saving for past Acts.

40. The provisions of this Act respecting the construction of Acts passed after the commencement of this Act shall not affect the construction of any Act passed before the commencement of this Act, although it is continued or amended by an Act passed after such commencement.

Repeal.

41. *The Acts described in the Schedule to this Act are hereby repealed to the extent appearing in the third column of the Schedule (d).*

Commencement of Act.

42. This Act shall come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

43. This Act may be cited as the Interpretation Act, 1889.

(d) S. 41 and the Schedule were repealed by the Statute Law Revision Act, 1908.

APPENDIX C

Statute of Westminster, 1931 (a)

(22 GEO. 5, c. 4.)

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December 1931.]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(a) See 46 Harvard Law Review 261; Wheare's Statute of Westminster C. P. (1933); and 48 L. Q. R. 191.

Meaning of "Dominion" in this Act.

1. In this Act the expression "Dominion" means any of the following Dominions (*b*), that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State (*c*) and Newfoundland (*d*).

Validity of laws made by Parliament of a Dominion.

2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Power of Parliament of Dominion to legislate extra-territorially.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation (*e*).

Parliament of United Kingdom not to legislate for Dominion except by consent.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion (*f*), unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Powers of Dominion Parliaments in relation to merchant shipping.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

(*b*) The Indian Independence Act, 1947 (10 & 11 Geo. 6, c. 30), created the Dominions of India and Pakistan but they were not added to this list of Dominions. India became a Republic on January 26, 1950. See hereon the India (Consequential Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 92).

Ceylon became a Dominion under the Ceylon Independence Act, 1947 (10 & 11 Geo. 6, c. 7), but was not added to the list of Dominions in this section.

(*c*) The Irish Free State became first Eire (Eire (Confirmation of Agreements) Act, 1938 (1 & 2 Geo. 6, c. 25)), and then an independent Republic: see the Ireland Act, 1949 (12 & 13 Geo. 6, c. 41).

(*d*) Newfoundland has now become part of the Dominion of Canada: see the Newfoundland (Consequential Provisions) Act, 1950 (14 Geo. 6, c. 5).

(*e*) See *Croft v. Dunphy*, [1933] A. C. 156, as to whether the provision is retrospective or not.

(*f*) As to these words, see XV Jo. Comp. Leg. (3rd series) 47.

Powers of Dominion Parliaments in relation to Courts of Admiralty.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

Saving for British North America Acts and application of the Act to Canada.

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Saving for Constitution Acts of Australia and New Zealand.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Saving with respect to States of Australia.

9.—(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section

applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland (g).

Meaning of "Colony" in future Acts.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

Short Title

12. This Act may be cited as the Statute of Westminster, 1931.

Royal and Parliamentary Titles Act, 1927

(17 GEO. 5, c. 4.)

An Act to provide for the alteration of the Royal Style and Titles and of the Style of Parliament and for purposes incidental thereto.

[12th April 1927.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power to alter style and titles of Crown.

1. It shall be lawful for His Most Gracious Majesty, by His Royal Proclamation under the Great Seal of the Realm, issued within six months after the passing of this Act, to make such alteration in the style and titles at present appertaining to the Crown as to His Majesty may seem fit.

Alteration of the style of Parliament.

2.—(1) Parliament shall hereafter be known as and styled the Parliament of the United Kingdom of Great Britain and Northern Ireland; and accordingly, the present Parliament shall be known as the Thirty-fourth Parliament of the United Kingdom of Great Britain and Northern Ireland, instead of the Thirty-fourth Parliament of the United Kingdom of Great Britain and Ireland.

(2) In every Act passed and public document issued after the passing of this Act the expression "United Kingdom" shall, unless the context otherwise requires, mean Great Britain and Northern Ireland.

Short title.

3. This Act may be cited as the Royal and Parliamentary Titles Act, 1927.

(g) Ss. 2-6 have been adopted by Australia (Statute of Westminster Adoption Act, 1942 (No. 56 of 1942)), (as from September 3, 1939), and by New Zealand (Statute of Westminster Adoption Act, 1947, (No. 38 of 1947)).

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